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No. 529

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 12,074.

WILLIAM KELLY

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant.

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.
(Civil Action No. 12439).

APPELLEE'S APPENDIX.

B. NATHANIEL RICHTER,
CHARLES A. LORD,
SEYMOUR I. TOLL,
RICHTER, LORD & LEVY,
121 South Broad Street,
Philadelphia 7, Pa.,
Attorneys for Appellee.

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APPELLEE'S APPENDIX

EXCERPTS FROM TESTIMONY

(18) LESTER FREEDMAN, having been duly sworn, was examined and testified as follows:

(Conference at side bar.)

Mr. Richter: Is it all right if I use this and hang the City Plan on this?

(The blackboard is produced before the jury.)

The Court: All right, I will come over there and be one of the jurors.

Mr. Richter: Thank you.

DIRECT EXAMINATION

By Mr. Richter:

Q. Now, Mr. Freedman, by whom are you employed?

A. By the Bureau of Surveys, City of Philadelphia.

Q. Do you have with you the official city plans showing the vicinity of 68th Street and Elmwood Avenue in the City of Philadelphia for the last twenty years or thereabouts?

(19) A. Yes, sir, I have the plan here that was confirmed in 1920.

Q. Do you have with you the deeds, the official original deeds, filed with the Recorder of Deeds of the City of Philadelphia showing the ownership of the bed at 68th Street in the City of Philadelphia just north of Elmwood Avenue?

A. Yes, I have two deeds of dedication.

Mr. Richter: May I have this marked, if Your Honor please, for identification?—First of all, will Your Honor permit that to remain here?

The Court: Yes, go right ahead.

(Deed of Dedication, No. 2840, was marked as Plaintiff's Exhibit 1 for identification.)

(Deed of Dedication No. 5745, was marked as Plaintiff's Exhibit 2 for identification.)

By Mr. Richter:

Q. This deed is from whom to whom, and what does it dedicate?

Mr. Price: If Your Honor please, I have no objection to the deed on the ground of its authenticity, although I haven't as yet seen it, but I object on the ground of its relevancy and materiality. So that I need not interrupt the examination of this witness, may I understand that my objection goes to this whole line of examination with reference to 68th Street, when it was opened and so on.

(20) The Court: It will be so considered, and you will not have to make any other objection to any of this line of testimony in order to protect your record.

Mr. Price: Thank you, very much.

The Witness: This deed, No. 2840, is a deed of dedication from—do you want the grantor?

By Mr. Richter:

Q. The grantor or person making the dedication—

A. George Martin Brill and wife to the City of Philadelphia for the east half of 68th Street from Elmwood Avenue north to the PB&W Railroad.

Q. That is the Philadelphia, Baltimore & Washington Railroad, is that right?

A. I will have to read the deed to get the exact name of the railroad.—I think that is the name—I can't find it.

Q. The PB&W is a subsidiary of the Pennsylvania Railroad?—Is that right?

Mr. Price: That is where the main line tracks are.

Mr. Richter: O.K.

By Mr. Richter:

Q. And what is this other deed?

A. This deed No. 5745 is a deed of dedication from Ben T. Welch and wife—Welch is the last name—for the

west half (21) of 68th Street from Elmwood Avenue to the PB&W Railroad.

The Court: What is the date on these deeds?

The Witness: The date on the deed or the date accepted?

The Court: Yes.

The Witness: The Welch deed is dated January 24, 1920.

The Court: And the Brill deed?

The Witness: And the Brill deed is dated June 16, 1899.

Mr. Richter: All right. Now, I offer these two deeds in evidence.

Mr. Price: Note the objection of the defendant.

The Court: Yes, your objection covers that.

(Deed of Dedication No. 2840, marked for identification as Plaintiff's Exhibit 1 is filed with these proceedings.)

(Deed of Dedication No. 5745, marked for identification as Plaintiff's Exhibit 2 is filed with these proceedings.)

By Mr. Richter:

Q. These are the deeds of dedication from the individuals to the City of Philadelphia and have on there for the bed of 68th Street?

A. Yes, sir.

(22) May I explain this Brill deed? This is for the dedication of other streets beside 68th Street.

Q. They include a number of other streets?

A. Yes, sir.

Q. And this includes the bed of the other half (indicating)?

A. Yes, sir.

Q. And these are produced by you from the official records deposited with the Recorder of Deeds?

A. No, they are deposited in my office.

Q. In your office?

A. They have been recorded and have been returned to my office for safekeeping.

Q. And your office is the official custodian for the City and County of Philadelphia?

A. Yes, sir, that is right.

Q. All right. Do you have with you the City Block Plan?

Mr. Price: May I see those deeds?

Mr. Richter: Oh, surely.

(Counsel examines Plaintiff's Exhibits 1 and 2.)

By Mr. Richter:

Q. Do you have with you the official City Block Plan for the City of Philadelphia for the years 1920 to 1925?

A. Yes, I have No. 248, confirmed by the Board of Surveyors, May 17, 1920.

(23) Q. Will you bring that down, please, and let us hang it up on this board.

(Witness produces plan referred to.)

Q. Now, looking at this plan, will you please tell us whether 68th Street north of Elmwood Avenue up to the PB&W railroad tracks appears on that plan as an open, dedicated street within the City of Philadelphia?

A. Yes, it was—

Q. Where is Elmwood Avenue?

A. Here is Elmwood (indicating).

Q. You are looking at the south, at the bottom?

A. Elmwood Avenue on the south, and the railroad right across here on the north (indicating).

Q. Can we agree that this is south down here (indicating)? This is south?

A. That is right.

The Court: Indicate that so that the jury can see it.

Mr. Richter: I will be glad to.

(Counsel marks plan accordingly.)

By Mr. Richter:

Q. This is west, east, south and north, and am I correct in suggesting that this is 68th Street?

A. That is right.

(24) Q. Where I am marking this here, is that correct?

A. That is right.

Q. That is a dedicated open public highway within the City of Philadelphia on this plan?

A. Yes, as of this date.

Q. Now, within any time from that date up until and beyond the date here (indicating), was any work done across the street; was there any change in this street remaining an open public highway?

A. No, there was no change up until 1925 or 1926.

Q. During all these years it was a public highway?

A. On the City plan, dedicated, yes.

Q. What is this I am pointing to? (Indicating).

A. Those are railroad tracks.

Q. Better put that in red chalk.

A. That is the Philadelphia, Washington and Baltimore Railroad.

Q. This is the railroad along here (indicating), is that correct?

A. Yes.

Mr. Richter: I think that covers what I want to know from you.

(25) CROSS-EXAMINATION

By Mr. Price:

Q. Mr. Freedman, you said it was a highway on the City plan; it wasn't an open street?

A. Physically?

Q. Yes.

A. I don't know that. I don't keep those records in my office.

Q. Who does?

A. It is possibly the Highway Bureau.

Q. Could you find out whether that was an open street?

A. I could ask them.

Q. Will you find out for us so that you will be able to testify whether on the plan of the City it was a dedicated open highway?

A. You mean a dedicated legally opened highway?

Q. Was it physically opened?

A. That is another question I can't answer.

Q. Could you find that out for us?

A. Yes, sir.

Q. Could you find out by tomorrow?

A. Yes, sir.

Q. I want to know whether there was an actual street or just a picture on a piece of paper. You understand what I mean?

(26) A. Yes, sir.

Q. Your plan showed or shows that as of 1926 it was on the city plan as a street?

A. That is right.

Q. And by city plan you mean a big drawing of the city which shows the location of the streets that are open, graded, and whatever routine you have to go through to get them open?

A. That is right. I am talking about the official plan as confirmed by the Board of Surveyors.

Q. That means it was put on their plan so that people can't go and build houses on it and then claim damages if the city opens it later?

A. That is right.

Q. It doesn't necessarily mean that the street itself is an open street and people can walk up and down or drive on it?

A. Well, it was on the city plan and legally opened;

that means it was under the control of the city itself. When it is dedicated it is under the control of the city, under the Highway Bureau.

Q. That is right. These deeds you have given us show that the title to that area was in the City of Philadelphia?

A. That is right.

Q. So that the city owned it?

A. That is right.

(27) Q. My question was merely, because they owned it and put it on the city plan as a street, that doesn't mean it is open and that people could drive horses and wagons or walk over it?

A. No, it doesn't.

Q. You do not know what physical condition this ground was in as of 1926?

A. I do not.

Q. Will you find out for us when it was actually—whether it was ever physically opened as a street?

A. I can ask the Highway Bureau.

Q. Whatever source you think is reliable and I will accept your judgment.

You said something about 1926; what happened in 1926?

A. In 1926 it disappeared from the plan.

Q. You say disappeared—from what action?

A. By the same action—there must have been an ordinance of Council and confirmation.

Q. Tell us about that. I don't know.

A. That is just the way it works. First, this is put on the plan—

Q. By ordinance?

A. By ordinance of Council approved on certain dates. This was approved June 26, 1918.

(28) Q. Is there any reference to an ordinance?

A. Yes, sir.

Q. What date?

A. June 26, 1918, and revised that whole area. It may include this street on the official plan at this date or it may not—it may have been on there before.

Q. All you can say, it was on there either by this ordinance or some prior ordinance?

A. Yes.

Q. It takes an ordinance to put it on the city plan?

A. Oh, yes.

Q. You can't have somebody say, I want to give you a deed for a street, put it on the city plan?

A. No, we cannot accept a deed unless it is first placed before the City Council and passed and signed by the Mayor.

Q. 68th Street got on the plan by ordinance of Council, signed by the Mayor?

A. Yes, sir.

Q. And how did it get off?

A. The same way.

Q. There was another ordinance of Council signed by the Mayor in 1926 taking it off?

A. That is right.

Q. After that did you carry it on your plan as a street (29) any more?

A. No.

Q. It disappeared from your city plan as a street in 1926?

A. Yes, sir.

Q. And it has not been on the city plan since then?

A. I don't think it ever went back again. I will have to look that up.

Q. Would you look that up, too, tonight, so that we can have it tomorrow? I am asking you to be sure since 1926 it was never on the city plan.

A. That is right.

Q. Since then it was removed by ordinance of Council, signed by the Mayor, and taken off the city streets, it was never a street since?

A. I think you are right.

Q. If you will verify that for us.

Mr. Richter: I will agree to that; I will agree to that,—no argument.

Mr. Price: I do not think it is on the plan.

The Witness: I don't think it was on the plan, but I would have to check it.

Mr. Price: Mr. Richter agrees for the record that this street was never put back on the city plan since it was removed by Ordinance of 1926.

(30) Do you have the date of that ordinance?

Mr. Richter: Yes,—we have it (producing same).

Mr. Price: That is the ordinance; the ordinance of May 4, 1926, which struck from the city plan this 68th Street from Elmwood Avenue to the railroad tracks that Mr. Freedman has been talking about.

Mr. Richter: That is right, that is stricken from the plan.

Mr. Price: And Mr. Richter agrees it was never restored?

Mr. Richter: Sure.—That is all, thank you very much.

* * *

(31) DEPOSITION OF STEVE MONAGHAN

(Mr. Lord on the witness stand reads answers.)

(Reading)

By Mr. Richter:

* * *

Q. Your full name and address.

A. Steve Monaghan, 1147 Myrtlewood Avenue, Upper Darby.

Q. Mr. Monaghan, by whom are you employed?

A. General Electric.

Q. Where?

A. 6901 Elmwood Avenue, West Philadelphia.

Q. Were you so employed on March 21, 1949?

A. Yes.

Q. How long have you been with the Electric Company?

A. Since 1945—I think 1945.

Q. What was your job with them?

A. Now, I operate a locomotive engine.

Q. Is that a Diesel?

A. Diesel electric.

Q. Well, they have several engines out there. Which one do you work?

A. They have two, but they only use one at a time.

Q. They only use one if the other isn't working?

A. They only use the one at all times—you know, at one time, at one day.

(41) Q. Which way is the front of the engine facing?

A. The front of the engine would be facing—

Q. Towards 70th?

A. Towards 67th.

Q. Toward the rear, you mean? That would be toward 67th?

A. Yes.

Q. And if you are going into the buildings, you are going backwards?

A. Well, it is the same; the cab is in the middle.

Q. If you are going into the building, the back end is going into the building at all times; is that correct?

A. Yes.

Q. When you say the conductor is ahead of you, you mean he is closer to 67th Street, isn't he?

A. No, he is the other way.

Q. Even when he is ahead of you? In other words, you are really looking backward, aren't you?

A. Let me say it this way: When we are coming out of a building—

Q. That would be going east?

A. Going toward 67th Street—he sees that everything is all right before we couple up, and then this brakeman, he stands on a platform and I stay on the outside of the door, and he signals the brakeman it is all right.

(42) Q. Who does?

A. The conductor.

Q. Where are they located at that time, just starting out of the building?

A. Out of the building, the brakeman is on the platform right at the door, right at the entrance.

Q. In order to do what with relation to your engine? Is he alongside of the engine or cars?

A. He is on the platform standing alongside of the car.

Q. Where is the conductor at that time?

A. The conductor is down on the other end, down on the hind end of the train.

Q. What do you mean by the hind end? Is he still further west?

A. Well, there is four cars in the building—

Q. You have a building and you have an engine and four cars coupled together, with the building on which side of you, the right or left? Is it toward the Pennsylvania Railroad system or towards Elmwood Avenue?

A. Towards Elmwood Avenue.

Q. The buildings are toward Elmwood Avenue; is that correct?

A. Yes.

Q. As you start to move, where in relation to the engine, first of all, is the conductor?

(43) A. The conductor goes into the building, first, and we come to the crossing, and I stay on the one side of the crossing, and they both cross over and they take me across.

Q. When you say "they take you," they move ahead of you in the direction you are going?

A. Yes.

Q. They signal you across?

A. Yes.

Q. Do they stand together or do they separate?

A. Well, they sometimes stand together, and sometimes they separate. Sometimes the fellow, like the conductor, he goes in to see that everything is all right. They have plates laying down where they load these cars.

Q. Race plates?

A. Yes, and they have to be raised and taken out, and he sees that all that is done and everything is all right.

Q. In other words, the conductor's job is to make sure that the loading and unloading is finished, and that the brakes are released on the cars, and therefore they can move without doing damage to property or injury to persons?

A. Yes.

Q. I am trying to get from you the relative positions of the two men. As you are starting to move, is one of them ahead of you in the direction you are going to go on the ground?

(44) A. We first come to the entrance of the building—

Q. That is where you are starting from?

A. Yes. We are not coupled up to the cars yet. The brakeman stands in on the platform alongside of the car. If it is all right to couple, and he gives me a signal, we couple up. Then the man on the other end, on the hind end of the cars, he signals him it is all right, to the brakeman, and the brakeman gives me the signal. Then the brakeman walks out ahead alongside of the track to the crossing to take the engine and the cars over the crossing.

Q. Where is the conductor all that time?

A. The conductor is on the hind end.

Q. So, the conductor stays at the hind end, but the brakeman goes forward?

A. That's right.

Q. Is that correct?

A. Yes, to take me over the crossing.

• • •

(81) Mr. Richter: If the Court please. This deed that was offered in yesterday, I would like to read the habendum et tenendum of the deed, the to have and to hold clause.

The Court: Are they in the usual form?

Mr. Richter: This is a specific form for dedication as used then.

The Court: For dedication—all right.

Mr. Richter: Now, this is the deed giving the bed of 68th Street by George Martin Brill and his wife, on the north side of the street, to the City of Philadelphia, and it reads as follows. The language is particularly significant:

"To have and to hold the said lots or pieces of ground above described unto the said The City of Philadelphia its successors and assigns to and for the only proper use and behoof of the said The City of Philadelphia its successors and assigns forever for public streets or highways and for no other purpose (82) but to the same extent and with the same effect as if the said street had been opened by a Decree of the Court of Quarter Sessions for the County of Philadelphia upon proceedings had for that purpose under the Road Laws of the Commonwealth of Pennsylvania."

That was the one that was dated in 1899.

Now, the other half of the street giving the full bed to the City of Philadelphia is the one from Ben T. Welch et ux., that means and wife, to the west half of the street, and there again in the habendum et tenendum clause, the to have and to hold clause translated from the Latin, we have this:

"To have and to hold the said lot or piece of ground above described unto the said The City of Philadelphia its successors and assigns to and for the only proper use and behoof of the said The City of Philadelphia its successors and assigns forever as and for a public street or highway and for no other use or purpose whatsoever and to the same extent and with the same effect as if the said had been opened by a Decree of the Court of Quarter Sessions of the Peace for the County of Philadelphia after proceedings duly had for

that purpose under and in pursuance of the Road Laws of the Commonwealth of Pennsylvania."

(83) That was the one dated May 17, 1920.

I have in my hands the official ordinances of the City of Philadelphia for the year 1923.—I think we can stipulate that these are the official ordinances?

Mr. Price: It sure is.

Mr. Richter: I will place in the record, if Your Honor please, a photostat copy of the same so that the whole book will not have to go in.

This is an ordinance which was duly passed—

Mr. Price: If Your Honor please, I object to the admission of the ordinance on the ground that it is immaterial and irrelevant.

The Court: Note the objection, and exception for the defendant.

Mr. Richter: William H. Felton, and later approved by the Mayor of Philadelphia then in office, W. Freeland Kendrick.

This is an ordinance to permit the Pennsylvania Railroad Company lines, lessee of the Philadelphia, Baltimore & Washington Railroad Company, to construct, operate and maintain two tracks or sidings across 68th Street immediately southeast of the southeast right of way line of the Philadelphia, Baltimore & Washington Railroad Company, Northwest Glenmore Street, in the 40th Ward. That is the title of the case.

(84) Now, this is the ordinance:

"Section 1. The Council of the City of Philadelphia ordains, That permission be, and is hereby granted the Pennsylvania Railroad Company, lessee of the Philadelphia, Baltimore and Washington Railroad Company, to construct, operate and maintain two tracks or sidings across Sixty-eighth street, immediately southeast of the southeast right-of-way line of the

Philadelphia, Baltimore and Washington Railroad, northwest of Glenmore street, to and into the property of the General Electric Company, as shown on plan on file in the Department of Public Works, Bureau of Surveys: Provided, That the said tracks or sidings shall be laid under the supervision and direction of the Department of Public Works, Board of Highway Supervisors, and shall be removed upon the passage of an ordinance to that effect, without recourse against the City of Philadelphia for damages, either property, personal or otherwise: And provided further, That the Pennsylvania Railroad Company shall enter into an agreement with the City of Philadelphia, satisfactory to the City Solicitor, to pay the additional cost of constructing a bridge (85) on the line of Sixty-eighth street when and as same is built, occasioned by the necessity of spanning the tracks herein authorized: And provided further, That the sum of fifty (50) dollars shall be first paid into the City Treasurer for the publication of this ordinance."

Those are the tracks that we are talking about, I think we can all agree. I haven't offered the other plan in evidence, but when I bring that in I will show you that.

Now, then, I have the ordinance of 1923—

First, may I have this marked for identification and offer it in evidence.

The Court: It may be admitted.

(The photostat of the ordinance referred to, approved June 25, 1919, was marked as Plaintiff's Exhibit 3, and is filed with these proceedings.)

The Court: And note the objection of Mr. Price.

Mr. Richter: Now, I have before me, if Your Honor please, the ordinance of the year 1924. That is likewise an ordinance of the City and County of Philadelphia, also executed by the Clerk of said Council, William H.

Felton, and signed by the then Mayor of Philadelphia, W. Freeland Kendrick.

Mr. Price: I also object to this ordinance.

(86) The Court: Your objection goes to all this. Note the objection there, please, and exception for Mr. Price.

Mr. Richter: Now, this ordinance reads as follows, the title is:

"An ordinance to permit the Pennsylvania Railroad Company, lessee of The Philadelphia, Baltimore and Washington Railroad Company, to construct, operate and maintain four additional tracks across Sixty-eighth street, between the southeast right-of-way line of The Philadelphia, Baltimore and Washington Railroad Company and the southeast building line of Glenmore street, extended; also to change the location of the two tracks across said Sixty-eighth street, authorized by ordinance which became effective July 12, 1923."

That is the title, and now I will read to you the ordinance itself:

"Section 1. The Council of the City of Philadelphia ordains: That permission be and is hereby granted The Pennsylvania Railroad Company, lessee of The Philadelphia, Baltimore and Washington Railroad Company, to construct, operate and maintain four additional tracks across Sixty-eighth street, (87) between the southeast right-of-way line of The Philadelphia, Baltimore and Washington Railroad Company and the southeast building line of Glenmore street, extended: to and into property of the General Electric Company: also to change the location of the two tracks authorized to be constructed across said Sixty-eighth street by ordinance which became effective July 12, 1923, as shown on plan on file in the Department of Public Works, Bureau of Surveys: Provided, That the said four additional tracks and the change in location of the two tracks heretofore authorized shall be laid under the

supervision and direction of the Department of Public Works, Board of Highway Supervisors, and shall be removed upon the passage of an ordinance to that effect, without recourse against the City of Philadelphia for damages, either property, personal or otherwise: And provided further, That The Pennsylvania Railroad Company shall enter into a supplemental agreement with the City of Philadelphia, satisfactory to the City Solicitor, to pay the additional cost of constructing a bridge on the line of Sixty-eighth street when and as the same is built, occasioned by the necessity of spanning the four additional (88) tracks herein authorized, as well as the two tracks heretofore authorized: And provided further, That the sum of fifty (50) dollars shall be first paid into the City Treasury for the publication of this ordinance.

"Approved the twenty-third day of July, A.D. 1924."

And that is signed by W. Freeland Kendrick, Mayor of Philadelphia.

I will ask to have this ordinance marked as an exhibit and offer it in evidence.

The Court: It may be admitted, subject to the objection of Mr. Price.

(The photostat of the ordinance referred to was marked as Plaintiff's Exhibit 4, and is filed with these proceedings.)

* * *

(89) DEPOSITION OF FRED JAMES POWERS

(Answers read by Mr. Lord.)

(Reading)

By Mr. Richter:

* * *

(97) Q. On this occasion when the accident happened, what was the first thing that was brought to your attention?

A. I seen the fellow laying under there.

Q. Did you hear him react?

A. I heard him holler.

Q. You did hear him holler?

A. Yes.

Q. When you heard him holler, did you look up that way?

A. I run up.

Q. Did you see him then?

A. Yes.

Q. He was in your view?

A. Yes.

Q. After you got there?

A. Yes.

(98) Q. How far away were you from him?

A. I will say about fifty yards.

Q. 150 feet away?

A. Yes.

Q. Well, standing on the ground where you were, if there was no locomotive there at all, could you look up that track?

A. If I am looking that way; but I have to watch myself getting off the train, too.

Q. So, on this occasion you weren't looking that way, but if there was nothing moving or if you were standing far enough away from the train, you could look up that track for two or three blocks, couldn't you?

A. I will say two blocks.

Q. That train, at the time this boy was run down, was more or less moving on a straight way?

A. Yes, it was straight.

Q. So, if the locomotive engineer didn't have to be concerned with watching for signals from you, he could look ahead and see down beyond the scale house, couldn't he?

A. Yes, if he was looking.

Q. If he was looking that way?

A. Yes.

Q. In other words, if he didn't have nothing else to do, he could look ahead and see what Kelly was doing?

(99) A. That's right.

Q. On account of his attention being diverted to you to get signals from you, he wasn't looking that way?

A. That's right.

Q. The locomotive wasn't moving fast?

A. No.

Q. It was going very slowly?

A. Yes.

Q. The locomotive was in good condition?

A. Yes.

Q. Brakes and everything?

A. Yes.

Q. Moving nice and quiet?

A. Yes.

Q. What make is that?

A. General Electric.

Q. A good Diesel?

A. Yes.

Q. It is kept in good shape?

A. Yes.

Q. And it runs smooth?

A. Yes.

Q. Did you talk to this boy or was he unconscious?

A. I was talking to him.

(100) Q. Were you talking to him?

A. Yes.

Q. Was he bleeding?

A. I don't know whether he was bleeding or not; I didn't look that close.

Q. You know he had an arm and a leg off?

A. Yes.

Q. He was in pretty bad shape?

A. Well, I guess he was. They wrapped him up in a blanket and put him on a stretcher, and the police car took him to the hospital.

Q. You were trying to keep him comfortable, were you?

A. Yes.

Q. Comfort him, I mean?

A. Yes.

Q. You didn't talk to him about the accident?

A. No.

Q. You didn't ask him anything about it?

A. No.

Q. Were you the first man to him?

A. No, the engineer was the first man.

Q. You got there about the same time?

A. He was over top and got down off the engine.

Q. How fast did you get there?

(101) A. A couple of minutes.

Q. Minutes or seconds? It is only fifty yards. Didn't you rush right up?

A. Yes, but you cannot run over them ties and all.

Q. Well, you got there very quick?

A. Yes.

Q. Did he at any time in your presence discuss the accident or how it happened or what they were doing?

A. Kelly?

Q. Yes.

A. No.

Q. I am talking about the boy.

A. No.

Q. Had you known Kelly?

• • •

(105) Q. Are there any overhead signals of any kind that warn of an approach of a train, or lights?

A. No overhead signals.

Q. Or warning of any kind that will warn of the approach of a train?

A. No. The only light we have is the light going into 10 building. There is a ramp there, and there is trucks parked there. There is 6, 8 and 10. There is trucks backed in back of 8 building, and I am standing at 10 building, and I

cannot see the engineer, and I press a button and a light lights up to let him know to go ahead.

Q. Let them know that a train is coming?

(106) A. No, lets the engineer know.

Q. Lets the engineer know that the trucks are coming out?

A. No, to bring the train across.

Q. Lets the engineer know to bring the train across?

A. That's right.

Q. Is there anything that controls this area, any kind of a light of the same type?

A. No.

Q. You haven't got a light down there?

• • •

(109) WILLIAM F. KELLY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(110) By Mr. Richter:

• • •

(111) If Your Honor please, I would like to bring this board over now and put another map up on it.

The Court: All right.

(Blackboard is produced before the jury.)

Mr. Richter: Now, is that so all the jurors can see it?

Mr. Price: Would you like to come over here while I point out some of the things to the jury about what this plan is.

This is south, east, north, and west. (Indicating.)

Now, these are the four main lines of the Pennsylvania Railroad at the top that run from the 30th Street Station out toward Washington, going south. (Indicating.) Along here in green pencil you can see as you look closer that is a fence that encloses this area. (Indicating.) That runs all along the railroad itself. I don't

want to get in here, I might encroach on some witness. In other words, there is a wire fench that encloses this area.

So that you can get a better idea—I will have these photographs marked for identification, with Your (112) Honor's permission.

If you will mark these.

(Photographs produced were marked as Plaintiff's Exhibits 5, 6, and 7, respectively, for identification.)

Mr. Richter: And if you will mark the map—

(Map referred to was marked as Plaintiff's Exhibit 8 for identification.)

Mr. Richter: Now, this gives you an idea looking from the north. You can see the fence we are talking about. (Indicating on photograph.)

If you will pass this around, please.

(Jury examines photograph.)

Mr. Price: That picture is taken from the opposite side of the track.

Mr. Richter: Yes, looking this way, looking south (indicating).

Now, here is a picture looking west of the whole works, and shows you the main line. This shows you the tracks we are talking about (indicating on photograph), the fence, and the G.E. plant down in here (indicating).

Mr. Price: That would be taken from about here on the map (indicating on map).

Mr. Richter: That is right.

(113) Mr. Price: Looking in that direction (indicating). That is, down along the tracks. These are the main line tracks, and these are the buildings (indicating).

(Jury examines photographs.)

Mr. Richter: Now, this last picture is 68th Street

looking south from Elmwood. This is what it looks like as you look toward the G. E. plant, north (indicating).

Mr. Price: There is 68th Street, so that it will be taken looking this way (indicating on map).

Mr. Richter: That is right.

Now, as you look at this map, you will remember that when we read these ordinances to you we read to you about the first two tracks, and then the four additional tracks, permission having been granted by the City of Philadelphia to the Pennsylvania Railroad Company to erect, construct, and maintain these tracks. Those are the words of the ordinance.

As you will remember, this is the main line up in here (indicating), and all of the connections, from here. You see this one connects outside of the fence (indicating), and if you will look at this picture you can see the gate through which the cars come (indicating). That is the gate right here (indicating).

(Jury examines photograph.)

(114) And when you go into your jury room you will see the word "gate" written on the map, and you will be able to identify it.

Now, inside this fence you will find the first two tracks—

Mr. Price: If Your Honor please, I don't mind Mr. Richter making a statement as to these tracks, but we haven't any testimony on the subject.

Mr. Richter: There are only six tracks, Mr. Price, and I don't know what other six there would be.

Mr. Price: All right. I just want to note that this is Mr. Richter's statement and not evidence in the case.

Mr. Richter: At any rate, you can see it for yourselves. There are 1, 2, 3, 4, 5, 6 tracks (indicating) that are here below the fence, below the Pennsylvania Railroad main right-of-way.

The Court: Are you through with the plan now?

Mr. Richter: Yes, sir. Oh, the No. 10 building is this building; that is the westernmost of the buildings. I guess this would be right in here (indicating).

Mr. Price: There is a number on one of the plans.

Mr. Richter: They are 4, 6, 8, and 10.

(115) Mr. Price: Let me be sure. All right. Here it is (indicating).

Mr. Richter: All right, I will put a "10" on there.

Mr. Price: All right.

(Counsel marks same accordingly.)

Mr. Richter: I think, Mr. Price, we can agree that this is the track out of which they came with the engine?

Mr. Price: That is my understanding, that they came out of this building No. 10.

Mr. Richter: All right, I am just going to mark it—I will fill the track space with a little blue chalk.

(Counsel marks same accordingly.)

They were down in here, and coming out here (indicating).

Can we also agree on the location of the switch, because here it is right here (indicating).

Mr. Price: I don't think that is it. I think this is the one (indicating). Let us be sure. I will find out accurately, but it is one or the other of these. I just can't remember, but it is one of these, and I don't want you to put a mark on it until we get it accurately.

• • •

(134) Q. Now, suppose you go on and just tell the jury just how you felt during the period that you were there?

A. In the hospital?

Q. Yes.

A. It was very sore and painful.

Q. What parts of your body were involved?

A. My missing limbs.

Q. What part of your anatomy, what limbs?

A. The left leg to the thigh and the left arm to the shoulder. It still feels as though they were there, and pains me and aches.

Q. After you had been there awhile did something happen that required you to be operated on again?

A. Yes, I had an emergency operation for a blood clot.

Q. Where was that operation done, what part?

A. In my abdomen.

Q. They opened your abdomen?

A. Yes, sir.

Q. Because you had a blood clot—

A. The blood clot couldn't get through the veins, and they had to cut the vein.

Q. They cut and tied it?

A. Yes, sir, they cut and tied it.

• • •

(143) CROSS-EXAMINATION

By Mr. Price:

• • •

(171) Q. You didn't hear the engine coming?

A. No, it was impossible to hear.

• • •

(176) REDIRECT EXAMINATION

By Mr. Richter:

• • •

(177) Q. All right. When you were being asked by Mr. Price whether you worked on the tracks in the yard next to the fence, at page 9 you were asked:

"Did you touch any of the tracks or—

"A. Yes, with a big wrench, I had a big wrench to feel the bolts and nuts and see that they were tight."

Is that correct?

A. Yes, sir.

• • •

(183) RECROSS-EXAMINATION

By Mr. Price:

• • •

(184) Q. It was the noise of the crane that you say drowned out the noise of the Diesel?

A. Yes, sir.

Q. And that was the thing that made it impossible for you to hear it, in your opinion?

A. Yes, sir.

• • •

(187) DONALD KING, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richter:

Q. Mr. King, where do you live?

A. 2701 South 70th Street.

Q. That is in South Philadelphia, is it not?

A. Yes, sir.

Q. Now, don't just shake your head—

A. Yes, yes.

Q. What business are you in?

A. Carpenter work, jobbing, carpenter and builder.

Q. How long have you been in that general vicinity in Southwest Philadelphia?

A. About eight years.

(188) Q. And how long have you been out in that ward?

A. I moved a couple times—

Q. Are you familiar with that whole Southwest area?

A. Yes, sir.

Q. And you have been in business a great many years?

A. A long time.

Q. What year did you move out there?

A. 1916, around that.

Q. Are you familiar with Elmwood Avenue up and down anywhere from 49th Street out to Elmwood Avenue and 73rd Street?

A. Yes, sir.

Q. Do you remember Elmwood Avenue at 68th Street in 1919 or 1920?

A. Yes, I used to work around there, all that neighborhood.

Q. Did your work take you past there quite frequently?

A. Every day pretty nearly.

Q. Will you tell us whether or not 68th Street had any curbing on it, on the north side of Elmwood?

A. There was a curb at the street entrance, that's all.

Q. Was the street paved?

A. No.

Q. Was there a street there?

A. There was a driveway that people used to go in and out with trucks, and buggies; and people used to play ball, play (189) ball games there.

Q. Where would they play ball?

A. In the field after you got in off the street.

Q. How far would the people ride or go in?

A. I couldn't say, but it went quite a distance.

Q. On Saturdays and Sundays were any special events held north of Elmwood Avenue there?

A. Saturdays, they would have a big crowd at that time.

Q. To see what?

A. Playing ball games.

Q. Do you know or do you remember who used to play there?

A. I think the Eastwick— I forget.

Q. Was the Gibson Club one?

A. That is right.

Q. They used to play there, and went up this unpaved street, 68th Street?

A. That is right.

Q. And you say you saw trucks and buggies, horses and wagons in that neighborhood?

A. Not all the time—people in that neighborhood would walk to the game Saturday afternoons.

Q. In those days between Elmwood and Pascall Avenues, were there any streets that had bridges going across the railroad?

(190) A. At that time 67th Street and 71st Street.

Q. And 71st Street?

A. Yes.

Q. Were there any other bridges in between?

A. No, there is one at 71st Street now.

Q. At that time did they build a group of houses south of Elmwood, known as the Hog Island houses?

A. Yes, sir.

Q. They were built in that vicinity?

A. Back of 72nd Street down to, I think, 66th Street, and then on the other side down to 61st Street.

Q. They run from Millick Street to 62nd, and from 66th to 72nd, all south of Elmwood, is that correct?

A. Yes, sir.

Mr. Richter: All right, you may cross-examine.

CROSS-EXAMINATION

By Mr. Price:

Q. Mr. King, you said they had curbing that turned in from Elmwood into 68th, did it go beyond the line of the sidewalk?

A. The sidewalk— the sidewalk turned in, and there was curbing there.

Q. There was no curb north of that point? The curb didn't go beyond the sidewalk?

A. No, not beyond the sidewalk.

(191) Q. It turned in, like these streets that have curbing, as if it was going to be done some later date, so that the curbing didn't go beyond the building line?

A. Yes, sir.

Q. And that was this situation?

A. That is right.

Q. Was Elmwood Avenue surface paved? Was there any paving of the roadway in alongside the curbing, or was it cut off—

A. I couldn't remember; it apparently just stopped there.

Q. So that there wasn't any surface paving like on Elmwood Avenue carried into 68th Street?

A. No.

Q. In other words, that was an open field?

A. It was an open field, yes.

Q. How big a field was it, how far did it extend in each direction?

A. It went as far as 67th Street back to the railroad track, as far as the G.E. building. The first building.

Q. Which was the first building?

A. At 70th Street.

Q. That is where they began building first?

A. Yes, sir.

Q. So that from 70th Street down east of this first building (192) that was put up by the G.E. was just a big open field?

A. Just a big open field.

Q. There were no streets across there?

A. No, sir.

Q. No roadway?

A. There was a worn down tracks or road— trucks used to drive the fellows coming out to the ball game; they would come in trucks and drive in there.

Q. When they got in past the building line which way would they turn, toward 67th or 69th?

A. They would go straight ahead— I can't remember how far beyond.

Q. That is where they parked the trucks?

A. I don't know where they parked; they went in and unloaded, and I went about my business, I didn't stop to look at them much.

Q. They could drive anywhere over the field?

A. There was a dirt road in there, they couldn't drive on the field because it would sink in the grass.

Q. The grass grew all around the outside of this road?

A. Yes, sir, all around the outside.

Q. And how long did that stay there?

A. I don't know, I can't remember.

Q. When was it that you first noticed that, when you first (193) moved there?

A. Yes, when I first moved there, I started to work in that section.

Q. And that was back in 1916?

A. In 1918.

Q. That is the condition it was in when you first saw it?

A. Yes, sir.

Q. And how long did it remain that way, do you remember?

A. No.

* * *

(209) LESTER FREEDMAN, recalled.

DIRECT EXAMINATION (Resumed)

Mr. Richter: May we first see Your Honor with the reporter at side bar, before we go on?

(The following proceedings were had at side bar.)

Mr. Richter: I am calling the City planning man back because he knows things I am interested in, but the other day Your Honor was questioning Mr. Price about things that happened after 1926, and to the extent that Mr. Price asks him these questions, I have no objection, but I want it understood on the record that as far as he goes beyond the line of my direct examination that he is his own witness, and he is asking him as part of the defense evidence.

I have no objection to him asking any questions (210) he wants with regard to the accident, but when it goes beyond my direct examination I want it under-

stood that it is a part of the defense and not a part of the plaintiff's case.

The Court: So that you will not be bound.

Mr. Richter: That is right.

Mr. Price: That is understood.

The Court: I think it would be well if both of you could clarify the situation of the Bureau of Surveys and how its function enters into the picture here, because all these deeds and documents are all a matter of public record.

Mr. Richter: Yes, sir.

The Court: I would like to have it clarified as much as possible.

Mr. Price: Let me say something about it. When this man is called to describe conditions that existed in 1920, 1921, or 1922, around there, I am certainly entitled to show as a part of my cross-examination what changes took place from that time up to the date of the accident.

Mr. Richter: You are entitled to show it as a part of your case, but not mine.

Mr. Price: I am entitled to show it as part (211) of the cross-examination.

The Court: Yes. Mr. Price, you developed that yesterday from the witness who was called and testified as to the old residences; you developed on cross-examination some of the things that he could probably tell us about. Now, your cross-examination here would be limited to the things that Mr. Richter first produced. But, if you want, while he is on the stand, to further clarify the situation and consider it part of your case, all right.

Mr. Price: I will not consider it part of my case if it is true cross-examination.

The Court: Of course—

Mr. Price: Your Honor will have to rule on that at the time.

The Court: That is absolutely correct.

Mr. Price: And I submit that I am entitled to cross-examine this witness—

The Court: But when the examination goes beyond where it is not cross-examination, if you want to follow it up as part of your case while you have the witness, go ahead and do that.

Mr. Price: Certainly.

The Court: I think we can keep it under control.

(212) Mr. Price: All right.

Mr. Richter: Thank you.

(End of side bar conference.)

By Mr. Richter:

Q. Now, Mr. Freedman, have you with you the official records to show what, if anything, the City of Philadelphia did after the property was dedicated to it, that is, the bed of the street of 68th Street, up to, but not beyond the year 1925? What installations, if any, were in the bed of 68th Street?

A. You mean the physical work that was done?

Q. Yes.

A. I have made inquiries from other officers just as you requested, and these other officers, the Highway Bureau and District Survey, have no record of any physical work done in the bed of 68th Street.

Q. What about water mains or lines?

A. Yes, sir, there was a water line laid in there around 1928—I am not sure of the date.

Q. Water line laid in the bed of 68th Street?

A. Yes, but there was no paving by the City.

Q. But, they ran a water line there?

A. Yes, sir.

Q. Are you sure of the year?

A. Well, I would have to check that again, I got that
(213) information from the surveyor of the Tenth District.

Q. What I would like to know, what year it was that the water line was laid in the bed of 68th Street north of Elmwood Avenue, and for what distance up to the PB&W railroad?

A. I think I can get that by calling on the telephone.

Q. If you will, and come back and tell us, and that is all I have, then.

CROSS-EXAMINATION

By Mr. Price:

Q. You thought it was 1928?

A. I think it was 1928, but I would want to check on that.

Q. You are going to verify the date?

A. I don't have those records in my office, I have to get them from the other office.

Q. The question I asked you the other day that you were going to look up, was whether 68th Street was ever physically opened?

A. Yes, I did look that up. It was not physically opened by the City. There was no permanent paving put in the street, by the City.

Q. Was there any permanent paving by anybody?

A. I don't know.

Q. You don't know of any permanent paving?

A. No.

(214) Q. Did the City do anything on 68th Street at Glenmore Avenue?

A. The only thing was a retaining curb—

Q. I said Glenmore Avenue, it should be Elmwood.

A. That is at Elmwood—

Mr. Price: It should be Elmwood.

The Witness: Yes, sir. At Elmwood there was a

retaining curb put in on 68th Street, that is, around the corners at the northeast and northwest corners.

By Mr. Price:

Q. It just goes around the whole 90 degrees?

A. Yes; I don't know just how far in it extended, whether it extended all the way to the house line, the 18 feet of the sidewalk on Elmwood, but they did turn in.

Q. And that was done when?

A. I don't know.

Q. That was sometime in the early 1920's?

A. I think so.

Q. And you said that in 1926 68th Street, between the railroad and Elmwood, was dedicated by ordinance?

A. That is right.

Mr. Richter: Of course, any examination along this line, I presume in accordance with Your Honor's ruling, is part of the defendant's case.

(215) Mr. Price: I don't understand any such thing, because Mr. Richter is the one that brought up this subject of 68th Street.

The Court: Then Mr. Freedman said that in 1926 certain things were done. Did he make that statement in response to your questions on cross-examination or in response to Mr. Richter's questions on direct?

Mr. Price: I don't remember, but it relates to the same street Mr. Richter is talking about, 68th Street.

The Court: What did you want to ask him about? What did you want to establish?

Mr. Price: That it was vacated in 1926 by ordinance of Council as he already described either yesterday or before—

The Witness: On Monday.

By Mr. Price:

Q. You described that when you were on the stand before?

A. I think I mentioned that.

Q. And Mr. Richter asked you to bring back when you came back the answer to the question whether 68th Street was ever physically opened; any current plan showing any bridges across the railroad tracks or anything in that neighborhood?

A. Yes, sir, I have the current plan.

Mr. Richter: Of course, all this is subject (216) to the same ruling, that anything beyond 1925, as far as we are concerned, is being offered as a part of the defendant's case.

The Court: Wait a minute. Suppose he testified to something in 1924 that would have a definite effect on the future; I think he could tell us that, Mr. Richter.

Mr. Richter: Your Honor pointed out that anything that has to do with the attempted removal of this street from the City plan is part of the defense in this case, and anything that was done since that time would naturally be a part of that, too. It is only a question of the legal burden of proof, it doesn't change the picture any; but, I feel in the interest of our client we are obliged to ask Your Honor to hold the cross-examination within the confines of the direct.

The Court: Let us reason that out a minute. You say that anything that had to do with putting it on the City plan—that was developed by you and was part of your testimony in chief.

Mr. Richter: Right.

The Court: The effect of that, when you stop there, is to imply that nothing else was done.

Mr. Richter: That is as far as we go.

The Court: And you would have a negative (217) inference. Now, on cross-examination I think it would be proper for the cross-examiner to bring out that, it is true in 1925 it was on the City plan, but he can ask him if any change was made.

Mr. Richter: He can do that as part of the defense, and I have no objection to that. But, rather than have Mr. Freedman come back—

The Court: No, I will permit this question and give you an exception. Watch for the next question which may be along similar lines, and I will rule on it as it comes up.

Mr. Richter: All right.

By Mr. Price:

Q. We are back to 1926. The ordinance which vacated 68th Street, you told us on Monday, if I recall correctly, that was vacated by ordinance of Council, with the same formality as it was put on the plan in the first place?

A. Yes, sir.

Mr. Richter: That is objected to.

By Mr. Price:

Q. Is that correct?

Mr. Richter: That is objected to, unless it is offered as a part of the defense. I don't want to put Mr. Freedman to the necessity of coming back, but—

(218) The Court: No, that was covered at the side bar conference.

Gentlemen, you used an expression that those of us who are familiar with City ordinances can understand, this term, "vacation of a street." I don't know whether the jury knows what is meant by the vacationing of a street. Do you want to ask Mr. Freedman about that?

Mr. Price: I think Mr. Freedman is well qualified to explain that to the jury.

If you will do that, Mr. Freedman, please.

The Court: Tell the jury what an ordinance vacating a street does, and what it means.

The Witness: Well, before a plotted City plan is

stricken from the plan, or vacated, there has to be an ordinance of Council passed and signed by the Mayor, and then it comes before the Board of Surveyors for final action and confirmation. No official street on the official City plan can be stricken or vacated off the plan without this action of Council and the Mayor.

The Court: Yes, and when that vacation takes place what is the effect on the adjoining properties, it vests the property back to the former owners; the City withdraws its claim.

The Witness: The City has no right to the (219) bed of the street and it is up to the abutting owners to prove their claim or title.

By Mr. Price:

Q. And so far as the City is concerned that street is wiped off as if it was never there at all?

A. That is right.

Mr. Richter: If they have the legal right to do so.

By Mr. Price:

Q. And that is what the City tries to do when it vacates a street, it takes it off the City plan?

A. Yes, sir.

Q. And there is nothing more the City has to do on its records?

The Court: It is private property from there on.

The Witness: The only thing it has is the old plan.

By Mr. Price:

Q. It goes back to its old position as it was before it was put on the plan in the first place?

A. Yes, sir.

Q. Was 68th Street ever put back on the City plan since that time?

(220) Mr. Richter: This is all subject to the same objection.

The Court: The same objection and the same ruling.

Mr. Richter: I would rather not have interrupted, Your Honor, but—

The Court: This goes to that whole line so that you will be protected.

Mr. Richter: Yes, sir.

The Witness: Do you mean, Mr. Price, after it was stricken in 1926?

Mr. Price: Yes.

The Witness: No, it was never put back. I have the present plan with me right here, which is the plan that is in force today; that shows no streets on the plan between 67th and 70th.

By Mr. Price:

Q. Today is five years after the accident. What we are really concerned with is 1949. I will ask you whether the plan you have there in front of you now shows the condition as it existed in 1926 immediately after the vacation of this 68th Street, and whether there was any change from that date to now?

A. No, there has been no change.

(221) Q. So that the plans you have in front of you, which are blueprints, show the condition as it existed in 1926 after the vacation of this street?

A. That is right.

Q. And there has been no change in that condition up until today?

A. That is right.

Q. That plan shows the condition as it is today, and as it has been for the last 28 years?

A. Yes, that is right.

Mr. Price: Thank you, that is all.

I would like to have that plan—can you leave that here? We may want to offer it later on. I can't offer it during the plaintiff's case, but I would like to have it marked for identification.

The Witness: This present plan? (Indicating.)

Mr. Price: This present plan—the present plan shows the condition as it existed continuously without change since 1926, is that right?

The Witness: Yes, sir, that is right.

Mr. Richter: For the record, may I move to strike all of this testimony in so far as it relates to anything after 1925 on the ground that it is all irrelevant because of the illegal action of Council at that time, in (222) view of the fact they were attempting to give public property to private interests. The City Council and Mayor were acting unlawfully in attempting to give public property away to the General Electric Company.

I rely on the ruling and decision of the Supreme Court three months old involving the Carlisle Market.—

Mr. Price: Has that brand new decision got a name?

Mr. Richter: Yes, sir. Brucker v. Carlisle Borough, 376 Pa. 330, in 1954.

The Court: I wouldn't want to be put in the position of passing on the legality of the City action in turning back—

Mr. Richter: Not at this time, but—

The Court:—this street to private owners. I watched with great interest the development of the 40th Ward. We went to City Hall over fifty years ago and in the Mayor's office, when there was nothing down there except some brush and reeds.

Mr. Richter: And I was born and raised there, as Your Honor knows.—

The Court: It is a big ward, and is very populous.

Mr. Richter: Over a hundred thousand.

(223) The Court: I will overrule your motion and give you an exception.

Mr. Richter: Thank you, sir.

The Court: I have already ruled on the other question. Your feeling was that that evidence may not be offered by the defendant as part of the cross-examination—

Mr. Richter: That is the first point. The second is, it is irrelevant because under the law there is no question about it, that the City may not give away public property for private use.

The Court: It can't give away park property—

Mr. Price: Mr. Richter is making the point that this was illegal. If it was, there is a proper forum to test that, but this is not the one. It would be improper to pass on the question of the legality or illegality of the ordinance here. You are bound to accept that as valid the same as any other Act of City Council.—

Mr. Richter: When and if such question of law is presented there is nothing Your Honer can do but decide this point of law; it is inherent in this case, and there is no escape from this issue.

The Court: All right. You get your records straight. I am not questioning that now. We turned over to the Baldwin Locomotive Works the street between 14th and (224) 16th, Hamilton Street, Baldwins put their wrecking crew in there and built the locomotive works, and we thought it was a wonderful job for the City.

You let me have more about this law.

Mr. Richter: Yes, I will bring it to Your Honor's attention as soon as we adjourn.

By the Court:

Q. How long have you been with the Bureau of Surveys?

A. Since 1922.

The Court: So that you have been all through this.

Mr. Richter: At this point I have no more testimony to offer until 2:00 o'clock, because we told the doctors not to come in until 2:00. But, I would like to have Your Honor direct the clerk of this court to produce the official docket entries in the matter of William J. Kelly versus General Electric Company. Will Your Honor direct that they be brought in so that we may read in evidence the docket entries?

The Court: Do you get that Miss Jenckes?

Miss Jenckes: Kelly vs. General Electric?

The Court: Do you want those records produced?

• • •

(242) Mr. Richter: This is an ordinance of Council dated the 2nd day of July, 1924, Your Honor.

The Court: And what is the ordinance, what is the title?

Mr. Richter: The ordinance is called, "An ordinance to authorize the laying of water pipe"—and then it has about a hundred different streets in which City Council authorized the laying of water pipe.

Section 1 reads—

Mr. Price: Page?

Mr. Richter: 282, the ordinance of 1924.

The Court: That is what used to be an omnibus ordinance.

Mr. Richter: That is right.

The ordinance reads as follows:

"The Council of the City of Philadelphia (243)

ordains, That the Department of Public Works be authorized to lay water pipe in"—

and I will skip the streets that we are not interested in—

"68th Street from Elmwood Avenue to the Philadelphia, Baltimore & Washington Railroad Company."

That is it.

The Court: That is from Elmwood Avenue to the Philadelphia, Baltimore & Washington Railroad on 68th Street?

Mr. Richter: Yes, sir. And that is dated the 2nd day of July, 1924, and signed by W. Freeland Kendrick, Mayor of Philadelphia.

The Court: All right.

* * *

(254) Q. This morning you said something about water pipes being laid in the bed of 68th Street, and you thought from your recollection that it was in 1928; did you find out accurately what year was?

A. Yes, I found it was laid under the ordinance dated July 2, 1924.

Q. Right.

* * *

(258) REDIRECT EXAMINATION

By Mr. Richter:

Q. By the way, of your own knowledge do you know that Elmwood is 2500 south?

A. I don't recall it now.

Q. Anyway, after Elmwood Avenue there are a whole series of streets and a whole community south of Elmwood?

A. Yes, sir.

Q. Buist, Dicks, Passyunk Avenue, Dorel, Grovers—these are between 67th Street and Island Road?

A. Yes, sir.

* * *

(260) Mr. Richter: The plaintiff offers paragraphs 2 and 3 of the complaint, admitted by the defendant in this case.

"2. The defendant herein is Pennsylvania Railroad Company, a corporation, which was at all times herein mentioned and now is a railroad corporation duly organized under and existing by virtue of the laws of the State of Pennsylvania. The said corporation is a citizen of that State and is authorized to do business in the Eastern District of Pennsylvania."

That is admitted.

(261) "3. At the time and place hereinafter mentioned, and for a long time prior thereto, the defendant, as a common carrier, operated, by electric and steam power, trains carrying passengers, freight, express packages, freight or baggage, and foreign and domestic mail in commerce between the different States of the United States and its territories."

That is admitted.

And paragraph 4, I will read so much of it as is admitted.

"4. At the time and place hereinafter mentioned, the plaintiff and the defendant were engaged in interstate commerce between the different States of the United States and its territories."

And the answer:

"4. Defendant admits that at the time alleged it was engaged in interstate commerce."

The Court: The Pennsylvania Railroad, the defendant, is admitting that?

Mr. Richter: Yes, that it was engaged in interstate commerce.

The Court: That is not disputed now?

Mr. Price: I ask that the rest of the answer be read.

Mr. Richter read only the first sentence of the answer (262) of paragraph 4, and I ask that it all be read.

Mr. Richter: I have no objection.

"Because the allegation of place is indefinite, defendant cannot say whether it was engaged in interstate commerce at the place alleged. Defendant does not have knowledge or information sufficient to form a belief as to whether plaintiff was engaged in interstate commerce as alleged."

That will be the subject of proof developed tomorrow, and which I believe Your Honor will find will conform to the record.

• • •

(266) EDWARD ROCK, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Richter:

• • •

(269) Mr. Richter: And the cars involved in this case were cars either in interstate commerce from some other state, other than Pennsylvania, or going to—

Mr. Price: There was no car involved in this; it was a locomotive.

Mr. Richter: They had hold of the cars.

Mr. Price: I don't know what the cars were.

Mr. Richter: We will see what all the cars did that day.

By Mr. Richter:

Q. And where is that going? (Indicating.)
A. Columbus, Ohio; that is March 22nd.
Q. To Columbus, Ohio, March 22nd?
A. That is right.
Q. And what is that? (Indicating.)

A. That is 31st and Chestnut, Philadelphia.

(270) Q. And there is one going to Baltimore, Maryland?

A. That is correct.

Q. This is marked prepaid? (Indicating.)

A. That is correct.

Q. In other words, the amount of the freight was prepaid in Philadelphia at the General Electric plant on 69th Street, is that correct?

A. That is correct, they prepaid the charges.

• • •

(272) Q. Do you look whether part of the merchandise in the car belongs to some other shipper, and they are using the rest of the car for a G.E. movement?

A. If there is complete ownership in the General Electric—

Q. But how do you tell when it is not?

A. That is the only thing that we would have—if there is any on that particular day, what we call a vari car.

Q. You call what?

A. A vari car. It is a combination of less than carload. We don't mix freight at the Paschall Station; they are all cardings.

We have one to Pitcairn, and one to Philadelphia (indicating).

Q. Different—

A. For different consignments from the General Electric.

Q. All the cars that are taken out of the General Electric plant are moved by Pennsy locomotive?

A. That is right.

(273) Q. No other railroad, the Baltimore & Ohio or the Reading, have anything to do with that?

A. No, no.

Q. You have the exclusive operation in there?

A. That is right.

Mr. Richter: O.K., that is all.

• • •

(298) ARTHUR LOUIS SHIVERY, having been duly sworn, was examined and testified as follows:

• • •

(303) CROSS-EXAMINATION

By Mr. Richter:

Q. Now, the fence is owned by the General Electric?

A. Yes, sir.

Q. That is in green on your plan?

A. Yes, sir.

Q. It is on Pennsy property?

A. Yes, sir.

Q. And you have the agreement in front of you?

A. Yes, sir.

Q. And does it read, inter alia, in paragraph 3:

"The Industry further agrees that the provisions of State and Federal statutes, as well as the rules, regulations, and requirements of the Interstate Commerce Commission, or of the appropriate State Commission, with respect to the construction, maintenance, and operation of the Industry's said side-track, shall be complied with."

(304) Does it say that?

A. Yes, sir.

Q. And No. 5:

"The said side-track shall be maintained and renewed by the respective owners and to the satisfaction of the Railroad Company, and the cost thereof shall be borne as follows:"—

Does it say that?

A. Yes, sir.

Q. Now, in paragraph 12:

"The Railroad Company reserves the right to disconnect the said side-track whenever, in its opinion, it

ceases to be safe for operation, or becomes impracticable of operation by reason of improvements on the railroad, required in order to fully accommodate the public requirements, or when the business derived from the said side-track is no longer sufficient to justify the maintenance and operation thereof, or if the Industry fails to keep and perform any of the covenants, terms, or conditions described in this agreement. Furthermore, if the Railroad Company is required to discontinue the said side-track connection, either by municipal or state authorities, or by the judgment or order of any judicial or any other tribunal having jurisdiction in the matter, (305) or if any suit shall be brought against the Railroad Company for the recovery of any penalty resultant from any alleged violation of law in connection with the running, hauling, or permission to be hauled or used, of any locomotive, engine or, car on or over the said side-track and its connections with the track or tracks of the Railroad Company, or if any party becoming vested with the title to the plant of the Industry fails to keep and perform any of the terms and conditions set forth to be kept and performed by the Industry, or, refuses to adopt this agreement and agree in writing to be bound thereby, the Railroad Company shall be entitled to take up and remove any or all of the said side-track owned by it as aforesaid, and shall not be liable to account in any way to the Industry for any moneys paid or expended on account of any of the said side-track covered by this agreement, or for any damage on account of the removal of the track owned by the Railroad Company, and upon such removal this agreement shall terminate."

Is that in the agreement?

A. Yes.

The Court: Is that No. 12?

Mr. Richter: No. 12, Your Honor.

REDIRECT EXAMINATION

By Mr. Price:

(306) Q. Mr. Shivery, on the first page, under paragraph 4, reference is made to some letters, X, Y, A to B-D, they relate to the corresponding letters on the plan that is attached to the back of the agreement?

A. Yes, sir.

Q. These are what these letters refer to?

A. Yes, sir.

Q. And you have to refer back to the plan in order to know what that is?

A. Yes, sir.

Q. Will you look at the plan attached to the back of the agreement; you see this line which has R of W?

A. Yes, sir.

Q. What is the "R of W"?

A. That is the right-of-way line.

Q. And is that the same as the red line shown on your larger blueprint, as the lower of the two red lines?

A. Yes, sir.

Q. As of this date, 1925, the whole track had not grown very much?

A. That is right.

Q. That first upper track, which is marked X to Y is part of what is now the two yellow tracks, is it not?

A. Yes, sir.

(307) Q. They are what is called the main line, Maryland Division, the four tracks shown in white on your blueprint?

A. Yes, sir.

Q. They are the same tracks?

A. Yes, sir.

Mr. Price: I think that is all, Mr. Shivery.

RECROSS-EXAMINATION

By Mr. Richter:

Q. Mr. Shivery, this agreement is dated May 14, 1928?

A. Yes, sir.

Mr. Richter: Thank you very much.

Mr. Price: I have substituted this white copy, but, of course, the whole agreement goes in, and I would like to read the first two or three paragraphs which are pertinent in the agreement when it is fresh in the jury's mind.

The Court: Very good.

Mr. Price: This agreement, which is dated May 14, 1925, between the Pennsylvania Railroad Company and the General Electric Company, it says:

"Whereas, the Industry—"

And where it says "Industry" that is the General Electric; so that whenever this refers to the "Industry" that means the General Electric.

"Whereas, the Industry desires the construction of (308) side-track facilities, hereinafter called the said side-track, to connect with the track or tracks of the Railroad Company on its Maryland Division, at Paschall in the County of Philadelphia and State of Pennsylvania, the said side-track having an aggregate length of —— feet, of which —— feet shall be located on the right-of-way and property of the Railroad Company and —— feet thereof shall be located beyond the limits of said right-of-way and property; all as shown on the plan hereto attached and marked 'Exhibit A,' dated 1-14-25, File No. 7009 and made a part of this agreement."

And then we come to paragraph 1 which says:

"That the said side-track shall be constructed as above indicated, on the following terms and conditions:

"That the Railroad Company shall construct and pay for that part of the said side-track on Railroad property (exclusive of grading) from X to Y, A to B-D, A' to B'-D' and A" to B"-D".

"That the Industry shall construct and pay for

that part of the said side-track beyond Railroad Property, B-D, B'-D' and B''-D''."—

That is what Mr. Shivery referred to as this sheet or map attached to the back of the agreement. There is (X) and there is (Y), so that it refers to that section; and there is A, and that is B to D, that little section from (309) this main track to the right-of-way line.

And there is an (A' to B'-D', that little curved track here (indicating), and A'' to B''-D'') which is that little curved track which goes down that way (indicating).

The part to be constructed by the railroad is this line of tracks with the three connections which run down to the right-of-way line of the railroad company. (Indicating.) That is also the yellow tracks shown on this blueprint (indicating). This, the railroad was to construct and pay for this part (indicating), and then the agreement goes on and says that the Industry shall construct and pay for that part of the side track beyond the railroad property. That is designated as B-D, B'-D' and B''-D''.

So that the industry was to construct any tracks that came below this right-of-way line and which was on the Industry property.

And then the agreement goes on:

"The Industry assumes and agrees to pay all charges, costs and expenditures which are imposed upon the Railroad Company by the Ordinance of Council of the City of Philadelphia, effective July 12, 1923, and July 23, 1924, with reference to the construction and maintenance of tracks across 68th Street not on Railroad (310) Company property, and below the established grade of the Street,"—

These are the two ordinances that Mr. Richter offered in evidence a couple days ago.

"and shall and will pay to the Railroad Company all such charges, costs and expenditures, for any and all

work done or to be done, or materials furnished by the said Railroad Company under and by reason of the said Ordinances and Orders of the Public Service Commission and the agreement made between the City of Philadelphia and the said Railroad Company, dated September 10, 1924, a copy of which is hereto attached and made part hereof,"—

And that is attached to this agreement.

"when the correctness of such charges, costs and expenses shall be certified to by the Comptroller of the Railroad Company; the said Industry holding itself liable therefor as if the obligation imposed upon the Railroad Company in said Ordinances and agreement had been directly imposed upon the Industry."

And then in paragraph 2 of the agreement it says:

"That the Railroad Company shall have the right to use the said side-track, without charge, when not to the detriment of the Industry, and that the Industry (311) will not direct or authorize the use of the said side-track by or for the benefit of any consignor or consignee not one of the parties hereto, except with the written consent of the Railroad Company first had and obtained."

Now, the third paragraph reads:

"The Industry will secure and assume the expense of securing and complying with any necessary ordinance, order, permit, or consent from any public authority for the construction, maintenance, and operation of the said side-track."—

And then paragraph 4.

"It is mutually understood and agreed that the ownership of the said side-track shall be and is vested as follows: Portion on Railroad property"—

And then the same letters are here again.

And "Portion beyond Railroad property,"—

And the same letters,

"owned by Industry."

That is the dividing line or the property line.

"It is, however, understood that in the event of the removal of the said side-track, in accordance with the terms of this agreement, that the track material contained in that portion of the said side-track on (312) railroad right-of-way, between the clearance point and right-of-way line, which was paid for by the Industry, shall become the property of and be returned to the Industry, the Industry bearing the cost of salvaging the material."

And then 5:

"The said side-track shall be maintained and renewed by the respective owners and to the satisfaction of the Railroad Company, and the cost thereof shall be borne as follows:

"Portion on Railroad property X to Y, A to B-D, A' to B'-D'; and A'' to B''-D'' by Railroad Company.

"Portion beyond Railroad property, B-D, B'-D' and B''-D'' by Industry."

And then paragraph 10 says:

"All expense consequent on a readjustment of the said side-track in order to conform to any change in the grade location, or alignment of the track or tracks of the Railroad Company at point of connection, or to conform to the location of additional track or tracks of the Railroad Company, shall be borne by the Industry."

And then it goes on:

"The Industry will assume and bear any and all loss or damage sustained by it in consequence of (313) any elimination of the said side-track, due to the relocation or change in the grade of the track or tracks of the Railroad Company by virtue of any municipal action or otherwise, or in the event the disposition of the property of the Railroad Company, or its future use

or development, make it impracticable, in the judgment of the Railroad Company, to continue the connection."

And then 11:

"The Industry will maintain, at its own cost and expense, in good order, at all times, the portion of the said side-track which it is required to maintain";

I think those are the only paragraphs that have any bearing on this case. You can have the agreement and read it all, if you want, but these are the paragraphs which have relationship to the evidence which I am going to offer now.

• • •

(314) JOHN E. WALLACE, having been duly sworn, was examined and testified as follows:

• • •

(315) CROSS-EXAMINATION

By Mr. Richter:

Q. Paragraph 3 of this agreement states that 'it shall take effect as of the date hereof'?

A. Yes, sir.

(316) Q. "and the permission and privilege hereby granted may be terminated at any time by the said Railroad Company upon thirty days written notice to the said Electric Company, and at and upon the expiration of said thirty days after service of such notice, this agreement and the privilege and permission granted hereby shall absolutely terminate and be extinguished, and thereupon the said Electric Company shall remove the said fence from the property of the Railroad Company, and restore the property to its former condition at its own expense." Right?

A. That is correct.

Mr. Richter: That is all, thank you.

• • •

(317) Mr. Price: With Your Honor's permission I would like to read one paragraph of the agreement.

The Court: All right, Mr. Price.

Mr. Price: Agreement dated July 9, 1925, between the Railroad Company and the General Electric Company, it says:

"that the said Railroad Company, in consideration of the sum of one dollar to it in hand paid by the said Electric Company, the receipt of which is hereby acknowledged, hereby grants to the said Electric Company permission and privilege, as a mere license, revocable and terminable upon notice as hereinafter provided, to construct and maintain a fence for a distance of 1086 feet upon the property of the said Railroad Company adjoining the plant of the said Electric Company, near 68th Street, in the 27th Ward of the City of Philadelphia and State of Pennsylvania, as shown in yellow on the plan hereto attached marked 'Exhibit A'."

That is how the fence came to be constructed on railroad company property by the Electric Company. That is intended to show.

• • •

(323) Mr. Richter: Let us read the ordinance.

Mr. Price: No, it doesn't say anything about a paved street, it talks about "street improvements."

Mr. Richter: A graded street, that is the word I want to use.

Mr. Price: That is what it says.

Mr. Richter: Graded street—O.K.

Mr. Price: But it was not paved.

The Court: This isn't Grays Ferry?

Mr. Price: It is Grays Avenue; that is a short street between 67th and 68th Streets.

Mr. Richter: I didn't see this, I must have overlooked it; somewhere the City apparently spent $8,358.00 to grade Grays Avenue—

Mr. Price: Glenmore Street, for grading Glenmore Street.

Mr. Richter: May we agree that Glenmore was graded?

Mr. Price: Certainly, that is what it says.

• • •

(324) Mr. Richter: Ready, yes, sir.

The Court: Bring the jury in, please.

(Jury in the box.)

The Court: You may proceed, if you are ready, gentlemen.

Mr. Price: Mr. Scott.

JOHN J. SCOTT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Mr. Price: First, if your Honor please, I would (325) like to answer Mr. Richter's inquiry which he made before lunch asking whether Mr. Buckalew is available; I find he has been dead ten years.

Mr. Richter: He is the man who signed this agreement?

Mr. Price: Defendant's Exhibit 3.

Mr. Richter: Between the General Electric and the Pennsylvania Railroad.

Mr. Price: That is right.

By Mr. Price:

Q. Mr. Scott, what is your occupation?

A. I am supervisor of safety.

Q. Where?

A. At the General Electric Company, 6901 Elmwood Avenue.

Q. How long have you been connected with the General Electric at that plant?

A. Oh, over 16 years.

Q. What does the General Electric do at that plant?

A. We manufacture switch gear; switch gear is electrical equipment machinery in steel plants, public utilities, and so forth and so on.

Q. That is the only thing you manufacture there?

A. That is right.

Q. How many different forms does that take?

A. Well, it requires all types of manufacturing operations (326) to build this equipment.

Q. What is one of the things that you manufacture look like; give us some idea what kind of machinery, is it a little package or a big one?

A. Well, they are all sizes. We have some small, maybe three by four, and then we have some very large breakers which would be, well, ten or twelve feet in the air.

Q. How large would they be?

A. That I would hesitate to guess, they are quite large.

Q. Several thousand pounds?

A. They would run several thousand pounds.

Q. And then you make small ones?

A. That is correct.

Q. It is all electrical equipment designed for operation of electrical appliances for other plants?

A. That is right.

Q. Has that been the business out there the whole time you have been there?

A. The whole time I have been there, that is the only business we have ever done there.

Q. This plan that we had offered in evidence marked Defendant's Exhibit 2 has a number of buildings on it, which have numbers 1, 2, 4, 4A, 6, 8, and 10. Is that done in all these buildings?

A. Yes.

Q. So that you have manufacturing equipment in all of these (327) buildings?

A. Yes, sir, in every one.

Q. What is the volume of business you do per year, not in dollars, but in the number of cars that you handle, do you know that, the number of cars of stuff that you ship out in the course of a year?

A. No, I wouldn't know that.

Q. Now, you said you were superintendent of safety at times; is your activity carried on over the entire area of this plan?

A. Yes, sir.

Q. All kind of safety?

A. All kind of safety.

Q. Both inside and outside the buildings?

A. That is true.

Q. Have there been any changes in the layout of the plan or the buildings since 1949?

A. We had a building built on the side of our No. 1 building.

Q. Beside No. 1 building?

A. That is correct.

Q. That is the one over on the right (indicating)?

A. Yes.

Q. When was that built?

A. That was completed this past year, 1953.

Q. Any change in the layout of the tracks or other building?

(328) A. No change in the layout of the tracks.

Q. When did you first learn of this accident?

A. 3-21-49.

Q. That is the day it happened?

A. That is the day it happened.

Q. Shortly after it happened?

A. Shortly after it happened, probably around a quarter of 3:00 when I heard about it.

Q. Did you get there before Mr. Kelly was taken away?

A. No, it was after.

Q. I show you some photographs—

Mr. Richter: They may be offered in evidence.

Mr. Price: I will have them marked.

(Photographs referred to were marked as Defendant's Exhibits 6 to 11, inclusive for identification.)

By Mr. Price:

Q. I show you six photographs marked Defendant's Exhibits 6 to 11, both inclusive, and ask you whether you were present when these photographs were taken.

A. Yes, I was.

Q. Attached to each of these photographs is a sheet with some identifying marks and an arrow or arrows shown; did you make these yourself?

A. I did.

(329) Mr. Price: I offer these photographs in evidence just marked.

Mr. Richter: All right.

(The photographs referred to, marked Defendant's Exhibits 6 to 11, inclusive, are filed with these proceedings.)

By Mr. Price:

Q. The arrows point to various objects in the picture which are identified with little legends on the right hand side?

A. Yes, sir.

Q. Will you pick up the photograph which shows the switch that was involved in this accident?

A. This one, D-8.

Q. D-8. Will you hold it up so that the jury can see the switch, just to the right of the little structure at the bottom.

The Court: That will be all shown to the jury a little later.

By Mr. Price:

Q. What is that thing under your finger, the two ties and the piece of machinery?

A. That is the switch.

Q. Just hold that up.

(Witness exhibits same to the jury.)

By Mr. Price:

Q. Indicating the lower left-hand corner, that is the switch (330) where the accident happened?

A. That is correct.

Q. Do any of the other photographs show it?

A. Yes, D-9 shows it.

Q. Is there a mark or a legend on there, too?

A. It is marked on D-9. (Indicating.)

Q. Pointing to the lower right-hand corner of the picture. That is the switch where the accident happened?

Mr. Price: There are two switches there.

The Witness: That is the one on the right hand side. (Indicating.)

The Court: The first one at the bottom?

The Witness: Yes, sir.

By Mr. Price:

Q. Will you mark on this blueprint, Defendant's Exhibit 2, that same switch, please?

A. This is the switch. (Indicating.)

Q. Just put a ring around it, I guess.

A. All right, sir.

(Witness marks same accordingly.)

Q. Will you do the same thing on the white one on the other side of this, that is Plaintiff's Exhibit 8.

(The witness indicates same accordingly.)

Mr. Richter: All right.

Mr. Price: Now, we have marked them on both plans.

(331) By Mr. Price:

Q. And that is the switch that is shown on the two photographs?

A. That is right.

Q. Defendant's Exhibits 8 and 9?

A. That is right.

Mr. Price: Could we let the jury look at these pictures now so that they will know what we are talking about, because we will have some conversation about them later.

The Court: All right.

Mr. Price: This is the order in which they were given. If you will pass them around.

(Jury examines Defendant's Exhibits 6 to 11, inclusive.)

By Mr. Price:

Q. And Mr. Scott, about how many employees are there on the payroll at this plant?

A. Around 5,800 at the present time.

Q. How are they divided up between manufacturing and indoor and outdoor people?

A. Well, they don't distinguish; it is usually between departments.

Q. A little louder, please.

A. They don't distinguish that way whether he works inside or outside.

Q. Between manufacturing and clerical?

(332) A. We have around 3,000 manufacturing people—this is approximate, of course—and around 1,800 clerical.

Q. For the outside working people that work outside in the yard, outside of the building on the railroad tracks and so on, under whose jurisdiction do they come?

A. They come under the Maintenance Department.

Q. That is called Maintenance?

A. That is right.

Q. Who is in charge of the cars or engines that you have there, is that Maintenance, also?

A. Maintenance would repair them.

Q. Then, what about the operation of shipping and loading of the cars?

A. The operation of shipping, that is, the loading of cars and the movement on our plant railway would be Mr. Shafer, under the Shipping Department.

Q. That is Mr. Shafer?

A. That is right.

Q. Is he the head of the Shipping Department?

A. That is right.

Q. And who is head of Maintenance?

A. Mr. Miller.

Q. Mr. Miller?

A. That is right.

(333) Q. When you speak about your plant railway, what is that?

A. We have two Diesel locomotives that we use for the transfer of material from building to building, or moving the cars from the interchange track into the buildings.

Q. You mean you own the—

A. We own the two Diesel locomotives.

Q. And what else do you have?

A. We have several box cars, several flat cars, that belong to the General Electric.

Q. And what do you do with those?

A. We use those—some we use in storage, that is, for material inside the building in one of the wells, and we use them for transferring some of our equipment back and forth in between buildings.

Q. Do they ever go off the General Electric tracks?

A. No.

Q. They stay entirely inside?

A. Stay entirely inside.

Q. Inside the brown track area?

A. Inside the brown track area.

Q. Not even on the yellow track?

A. No.

Mr. Richter: What is that?

Mr. Price: The flat cars which they own.

(334) By Mr. Price:

Q. How much track is there inside the General Electric property line?

A. We have approximately two and a quarter mile trackage.

Q. They are all the brown tracks shown on this blueprint, D-2?

A. That is correct.

Mr. Price: Cross-examine.

CROSS-EXAMINATION

By Mr. Richter:

Q. When the buildings were originally erected along Elmwood Avenue, that went as far east as 69th Street and west from 69th toward 70th, is that correct?

A. Well, you are going back a little before my time, I am afraid I am not qualified to answer a question like that.

Q. It wasn't until after 1926 that the building was put here on Elmwood Avenue which appears on this exhibit, that is 68th Street looking north—

Mr. Price: What number is that, Mr. Richter?

Mr. Richter: Plaintiff's Exhibit 7.

By Mr. Richter:

Q. That was put up after 1926 sometime?

A. It was probably under construction in 1923, but I don't know.

Q. You wouldn't know?

(335) A. I am not qualified to answer.

Q. You don't know the answer to that?

A. That is right.

Q. You have a department called the Railroad Department?

A. No.

Q. Did the General Electric incorporate a separate corporation to run this railroad like Bethlehem did, like the

Conemaugh & Black Lick Railroad, or the Union Railroad?

A. I don't know what they are.

Q. You know of any incorporation by the General Electric at 68th Street?

A. I am afraid I don't understand.

Q. General Electric didn't take the railroad tracks, these cars and these two locomotives, and the various equipment that it has, and put it into a subsidiary corporation and incorporate it as a railroad under the laws of any state of the Union?

A. We come under the State Department of Labor and Industry.

Q. Did you incorporate as a railroad corporation?

A. That I don't know, but we don't use that as a railroad; that is strictly for internal purposes.

Q. It is a regular standard gauge railroad?

A. That doesn't make any difference. We still use it only inside the plant.

Q. Just answer my question. It is a standard gauge railroad?

A. That is right.

(336) Q. You don't just move your own two or three box cars, you move cars all over the tracks from railroads all over the United States?

A. That is quite possible, if we load a car—

Q. Just answer my question. You know you do?

A. Yes.

Q. And it is true every day you have cars from all over the United States there? That is right?

A. That is right.

Q. You also move cars when they come in, less than full carloads, containing merchandise from other shippers, you move these cars around, too?

A. I am afraid you will have to ask that question from someone else. I am not qualified to answer that question.

Q. You have a set of rules for the operation of this railroad, safety rules?

A. Yes, we do.

Q. That is for the operation of this railroad as a railroad?

A. Only as a plant railway under the Department of Labor and Industry of the State of Pennsylvania.

Q. You were not there when this accident happened; you only learned about it an hour or two later?

A. I got there 15 or 20 minutes later.

Q. And the man was already gone, you say?

A. That is right.

(337) Mr. Richter: That is all, thank you.

RE-DIRECT EXAMINATION

By Mr. Price:

Q. Mr. Scott, I forgot to ask you about the compensation agreement. Did you enter into a compensation agreement with Mr. Kelly?

A. We did.

Q. That is dated 3-28-49, and has been in operation ever since?

A. That is right.

Q. Mr. Kelly said he didn't pay any medical expenses or bills—

A. The General Electric Company did.

Q. Do you know approximately the amount?

A. It was a little over four thousand dollars.

Q. Has Mr. Kelly asked the General Electric Company for any medical treatment of any kind that he hasn't gotten?

A. Not recently.

Q. At any time?

A. At no time, he always got all the medical attention he had coming to him, and after he was discharged he hasn't asked for anything since.

Q. Approximately when was he discharged?

A. Well—

Q. Several months after the accident?
A. Five or six months afterward.
(338) Q. You mean discharged from the hospital?
A. Discharged from the hospital.
Q. And since that time he hasn't asked for any medi-
al assistance or treatment?
A. No.

Mr. Price: That is all.

RE-CROSS-EXAMINATION

By Mr. Richter:

Q. Why was he discharged from your company?
A. Discharged from the company?
Q. Yes, stricken from the rolls.
A. Yes.
Q. He was?
A. That is an automatic process.
Q. You mean when a man gets hurt you fire him?
A. No, no—
Q. That is what I want to know.
A. There is an automatic process—
Q. What do you mean by "automatic process"?
A. That is a procedure that is set up within the General
Electric if a person is out over 14 day period they automati-
cally remove him from the payroll.
Q. When a man is hurt through no fault of his own he
is automatically removed from your payroll, is that correct?
(339) A. Yes, that is the procedure—

Mr. Richter: That is all, thank you.

Mr. Price: That is all, Mr. Scott.

Mr. Price: Mr. Shafer.

GEORGE W. SHAFER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Price:

Q. Mr. Shafer, by whom are you employed?

A. General Electric 69th and Elmwood.

Q. And have been for how long?

A. 30 years.

Q. How long have you been at that particular plant?

A. 30 years.

Q. What is your position there at the present time?

A. At the present time I am supervisor of shipping and traffic, high voltage switch work.

Q. And in 1949?

A. Superintendent of Distribution, Switch Gear Department.

Q. Will you tell us in simple language what this means?

A. In 1949 we had one manufacturing department, one shipping and traffic section, and one distribution section.

(340) Q. And that was yourself?

A. Yes. Since then, we have decentralized, and there are now three independent manufacturing operations, high voltage, mean voltage, and high voltage. There are two shipping and traffic sections, and I am supervisor of one.

Q. Going back to 1949 when this accident happened, what was your position?

A. Superintendent of Distribution.

Q. That included what, briefly?

A. Responsibility for packing and preparation of shipping papers, routing, operation of the railroad yard, and the box shop, in which we manufacture our own boxes, crates, and skids.

Q. Whose responsibility was it, to load cars, freight cars, that would leave with goods that you sold, or that came in with goods you purchased?

A. The responsibility for loading of the outbound shipments was mine, and the responsibility for the inbound

shipments rest with the individual in the receiving department.

Q. What did you have to do with the cars themselves that were loaded when you wanted to get rid of the car?

A. The first thing was to determine and make sure we had sufficient and adequate cars, that they were properly loaded, braced and blocked in accordance with the loading rules and (341) regulations; and that the proper paper work was turned over to the transporting agent.

Q. Were you familiar with the method in which these cars were handled in this general area?

A. Yes, I am.

Q. How would they be handled?

A. By one of the Diesel engines, one 45-ton capacity and the other 25 ton capacity.

Q. And what was their function?

A. Their function was to perform intra-plant shipping on our own trackage within our own yard and buildings.

Q. Where did the cars come from, to start with.

A. The cars for shipment by railroads are furnished by the Pennsylvania Railroad.

Q. How do they furnish them?

A. By their own power.

Q. What do they do when they are brought in your place?

A. They are placed on the inbound track.

Q. That is one of the yellow tracks on this blueprint?

A. It is the second track, the second yellow track from the fence.

Q. The second one from the fence? And what was the first one from the fence?

A. The outbound track.

(342) Q. Tell us how these two tracks work, what the setup was, and how they were used both by your people and by the Pennsylvania Railroad crew?

A. Inbound cars consist of both loaded for the receiving section and empty cars for shipment. As the cars were required in the buildings for loading they were removed from

the interchange tracks by our own power and placed within the buildings.

Q. By your power you mean your own Diesel—

A. By our own locomotives. When the cars were completed loaded the cars would be removed from the buildings by our locomotive, weighed, and then placed on the outbound track on our property.—

Q. That was the first track next to the fence?

A. That is the first track next to the fence.

The Court: And what happened after that, when they were loaded, what was the next step?

The Witness: Then they would be removed from our plant property by the Pennsylvania Railroad locomotive.

By Mr. Price:

Q. You said something about shipping documents. Describe how you would get rid of the car when it was loaded and ready to go out. What was the routine from the time it left your building, when it was loaded by your people, until it left (343) the outbound track?

A. All shipments are described on the shipping papers. When the shipments are completed on the shop floors and completely loaded the papers are returned to the shipping office; load talleys are prepared, checked with the car contents, and the paper goes to the typist who prepares the bill-of-lading for the freight shipment. The car weights or shipper's weights are telephoned from the scale house to the shipping office.—

Q. That is the scale house on your own property?

A. Our own scale house—that is our own scale house on our property.

Q. That is a little rectangular white building shown on the blueprint?

A. That is right. That is administered by the employees. After the weights are determined they are telephoned to the office. The shipper's weight is part of the information required on the bills-of-lading.

When the bills-of-lading are completed for the shipment they are carried by car to the Paschall Freight Station.

The Court: Have you got a bill-of-lading for us? I think that is quite important for us to see what a bill-of-lading is here. On whose stationery is the bill-of-lading, (344) the General Electric's or the Pennsylvania Railroad's?

The Witness: It is General Electric stationery.

The Court: The heading is the General Electric caption?

The Witness: No, it says, General Electric Company, 6901 Elmwood Avenue, Philadelphia, as the shipper.

The Court: As the shipper?

The Witness: That is right.

The Court: And what was the other literature?

The Witness: The bills-of-lading include the shipping destination, name of the consignee, routing, car number, weights, number of cases, crates, or contents of the shipment; the classification, such as circuit breaker, switchboard, or other electrical commodities. The identification of the shipment that we use in our internal transactions.

The Court: The bill-of-lading is actually a bill for loading of the cases in the car and—

The Witness: Not necessarily, the bill-of-lading is a receipt and a contract with the transportation agency to perform certain service in respect to that shipment.

The Court: It isn't a receipt until it is received by the railroad?

The Witness: Yes, a shipment that has been loaded, that compares, for instance, with an individual in a similar (345) operation for a shipment that he takes to a freight station.

The Court: That is what I [illegible]ed to make plain.

The Witness: On a similar operation, a storekeeper

may have a shipment which he would take to the freight station and exchange it for a bill-of-lading. The bill-of-lading in that case would be a receipt for the shipment which the storekeeper has delivered to the freight station, and also a contract with the transportation agency to perform certain transportation services and delivery.

The Court: Given by the railroad company?

The Witness: Given by the railroad company, that is right.

The Court: But in your case you do your own loading—

The Witness: In our operation where large volumes are handled we have the privilege of loading our own freight cars, preparing our own bills-of-lading which go to the freight station, and the agent in the freight station doesn't see our shipments; they are loaded in the cars by ourselves and placed by our own power on the outbound track. From that point the railroad locomotives pull them from the plant.

By Mr. Price:

Q. You said you send the bills-of-lading by car, automobile?

(346) A. That is right.

Q. To the Paschall Freight Station?

A. Yes.

Q. That goes how often?

A. Once a day, late in the afternoon.

Q. That is for all the cars that are loaded, ready to go out?

A. Yes.

Q. And until the railroad gets the bill-of-lading the railroad was not authorized to move the cars?

A. That is right.

Q. When you send them down where are the cars which are represented by these bills-of-lading?

A. On the outbound track.

Q. Who puts them there?

A. We do.

Q. With your own Diesel locomotive?

A. With the General Electric locomotive.

Q. After you put them on the outbound track do you have anything further to do with these cars after you deliver the bills-of-lading to the Paschall Freight Station?

A. No.

Q. How do they get out of your yard?

A. They are removed by the Pennsylvania Railroad locomotives.

Q. And when the Pennsylvania Railroad crews and locomotive (347) come in, do they have any further conversation with you or your people about getting them out?

A. Not necessarily.

Q. They are authorized to come in and pull them out?

A. That is right.

Q. And how about inbound cars, loaded, not empty, how do they get in your place?

A. They, likewise, are placed by the Pennsylvania Railroad on our inbound track.

Q. On your inbound track?

A. That is right.

Q. If the inbound track and the outbound track are both filled at that particular moment, what will the railroad crew do?

A. The Pennsylvania Railroad has the privilege of putting inbound cars on two additional tracks on our property, our No. 1 and our No. 2 track.

Q. When you say they have the privilege, what do you mean?

A. Both of the tracks on our own property should be full, they need not ask for any privilege or permission, or anything of the sort.

Q. So that they just put them in there without telling you?

A. That is right.

Q. How long has that arrangement been in effect?

(348) A. How long has it been in effect? It was revised slightly within the last two years, I believe.

Q. But before that—how long have you been familiar with this operation?

A. To one degree of responsibility or another, for thirty years.

Q. And has there been any material change in it since then?

A. Oh, no.

Q. When these cars are put in and left by the Pennsylvania Railroad crew, does the Pennsylvania Railroad crew have anything moré to do?

A. Not until they are ready to be moved away.

Q. And that is as you described before?

A. Yes, sir.

Q. And what do you do with the cars that have been brought in loaded for delivery to the General Electric plant?

A. Place them wherever required for unloading.

Q. Who handles the unloading?

A. The Receiving Section.

Q. So that the loading and unloading of all cars is done by the General Electric employees?

A. That is right.

Q. And the movement of all cars after they are placed by the Pennsylvania Railroad on the receiving track, whatever it may (349) be, is done by your employees?

A. That is right.

Q. How do you handle the empty cars that are brought in by the Pennsylvania Railroad and left there for you to load, where are they put?

A. On the inbound track, and from there to the interchange track and from these tracks to the buildings for loading.

Q. What, if any, movements do the Pennsylvania Railroad crews make inside the fence in addition to putting cars on the two yellow tracks?

A. None.

Q. Or on No. 1 or No. 2?

A. None.

Q. Have they ever done any movement or shifting of cars inside your place?

A. Yes, sir, at one time when both our locomotives were out of service we arranged for intra-plant switching and car placement by the Pennsylvania Railroad.

Q. When was that?

A. In March, of 1953.

Q. Had that ever been done before?

A. Not to my knowledge.

Q. You say, "we arranged"—

A. I arranged it.

Q. And did you pay for it?

(350) A. We did.

Q. What did you hire?

A. Comparatively small Diesel electric locomotive from the Pennsylvania Railroad.

Q. And how many crew?

A. Four-man crew.

Q. Did you hire them by the day or the week?

A. By the day, for two days.

Q. You had them for two days?

A. That is right.

Q. And what did the locomotive do?

A. The same service that our own company locomotive normally performed.

Q. And except for that has the Pennsylvania Railroad done any shifting or switching of cars inside your plant, that is, on the brown tracks?

A. No.

Q. Is there any difference between the term switching or shifting?

A. No, they are interchangeable.

Q. It means the moving of empty or loaded cars around so as to make up the train wanted, and put them in different places?

A. All loading or unloading is at our own convenience within the plant property.

(351) Q. Have you ever paid the Pennsylvania Railroad, or anybody else for that matter, for any shifting for service inside your plant except on these two days when you hired a locomotive to do it for you?

A. Not to my knowledge.

Q. Are you familiar with the switching tariff?

A. To a degree.

Q. If you called on the Pennsylvania Railroad to move cars inside your plant, you have to pay?

A. Oh, gee, yes.

Q. Can you tell us why you have your own Diesel engines?

A. It would cost much less, which is probably the most important factor; and another is, for much greater flexibility; it is much more convenient for us to control our own intra-plant work.

Q. If you had to have the Pennsylvania Railroad do it, would it cost more or less than if you did it yourself?

A. Much more.

Q. Now, there was something said about a car that was not fully loaded, not completely loaded both coming in and going out, can you tell us about the handling of such cars and how they get that way?

A. There are times when a complete shipment isn't available. If the shipping floor had one placement of the car—

(352) Q. You are talking about coming in?

A. Outbound shipments that are not completely ready, the car is placed and the material that is ready is loaded into the car, and then the car is removed from the building and held temporarily on our own track. When the balance of the shipment is ready the car is returned to the building and the shipment is loaded up and the car finished.

Q. Do you ship out any cars that are not fully loaded?

A. Yes, we frequently ship cars that are not fully loaded because we have some shipments for some customers

—the one thought that occurs to me—they didn't order enough equipment to fill a car; at least, their order is only for a part of a carload, in which case whatever space is required is the only space used.

Q. So that you put that much into the car and leave the rest empty?

A. That is right.

Q. And you deliver that to the railroad on the outbound track with the bill-of-lading for a partial load?

A. That is right.

Q. That is called an lcl, or less-than-carload shipment?

A. Yes, sir.

Q. And what happens to it after that?

A. Well, that car would be removed from our track the same (353) as a carload would be removed.

Q. And whether the railroad fills the rest of the car or not you do not know?

A. Generally they don't, but I wouldn't know.

Q. And how about coming in, are there any cars that come in and make delivery to you of less than a full carload?

A. Yes.

Q. Will you describe that?

A. A piece of machinery, for instance, which may have been purchased and wouldn't completely fill a car, and it would come in as a part-carload. The car would be placed as any other freight car by the Pennsylvania Railroad on our property, and finally placed for unloading by our own service.

Q. Would that car have anything in it except what was consigned to you?

A. No, it would not.

Q. Do you know of any case where cars have come in where half of the car or some portion of it contains material consigned to you and the rest of the car contains material consigned to somebody else?

A. Yes, we do.

Q. Are those cars handled any differently from cars you get either fully loaded or completely empty?

A. Except for a mistake, that occasionally occurs when a (354) car should not be even placed in our plant at all. We have received cars that were completely loaded elsewhere for partial unloading of our portion of the carload and the balance of the shipment would go elsewhere. We have had some shipments from our plant in Pittsfield, Massachusetts, of which, perhaps, half of the carload would be ours and the other half of the carload for another General Electric plant in Philadelphia.

Q. Are these handled any different as far as receiving them or taking them out, or your shifting inside the plant is concerned?

A. No.

Q. Just the same?

A. That is right.

Q. No difference or distinction?

A. No difference.— May I make one correction?

Q. Yes.

A. Except in placing partly empty cars back on the outbound track we wouldn't require a bill-of-lading.

Q. Where you unload all that was coming to you you don't need any bill-of-lading to get rid of it? It belongs to the railroad when you put it on the outbound track?

A. That is right.

Q. Now, you described a service which you were able to (355) purchase by the day, the locomotive and the crew, when your own locomotive was broken down; do you get any other service you got to pay for from the railroad, equipment or cars?

A. Yes, we are not equipped to perform major repairs on our railroad equipment, and when it is necessary that major repairs be made we have arranged with the Pennsylvania Railroad to perform such services for us.

Q. Do they do that for nothing?

A. Oh, no, there is a charge for such work.

Q. They charge you for that?

A. Yes, sir.

Q. How often does that occur?

A. I recall twice in recent years that the railroad has helped us by performing some repair service which we were not equipped to perform ourselves.

Q. I am sorry, I can't catch your last few words.

A. Twice the Pennsylvania Railroad has performed service in their car shops for us which we were not equipped to perform ourselves.

Q. And for other types of work on your locomotives, did they ever send anybody down to do that sort of thing for you?

A. We did that ourselves.

Q. Unless the locomotive has to be taken away to do the work there?

(356) A. That is right.

Q. Perhaps I should put it the other way, if you can do the work there, you do it there, otherwise it is sent away?

A. That is right.

Q. How many locomotive crews do you have?

A. Two.

Q. They function the same period of time?—

A. No, one is from 7:45 in the morning to 4:15 in the afternoon; and the second crew has the second shift, 4:15 to 12:45 the following morning.

Q. So that you cannot have more than one locomotive working at a time?

A. No, sir.

Q. Is there any regular time or order in which the Pennsylvania Railroad crew comes in to your plant?

A. They normally place cars for loading in the morning around 10:00 o'clock, or 10:30; and they normally remove loaded cars or discarded empty cars around 5:00 o'clock in the morning.

Q. 5:00 o'clock in the morning?

A. That is right.

Q. So that after they have been there delivering around 10:00 o'clock in the morning do they come back in the plant or have any reason to come back the rest of the day?

(357) A. Not normally. Occasionally we may have a rush shipment that may be ready loaded in the afternoon and we may ask for a special move, but that is the exception.

Q. Unless you ask for a special move it is once a day in the morning and once a day at 5:00 o'clock in the morning?

A. Yes, sir.

Q. Do you know how long it takes the Pennsylvania Railroad to deliver a string of loaded or empty cars—how much time they spend in your yard?

A. Five, six, seven minutes.

Q. Do they have anything to do except to deliver or take away cars?

A. No.

Q. They don't move any cars except directly in or directly out?

A. No, sir.

Q. Have they ever done—except on these two days when you hired the locomotive and crew—have they ever shifted or switched cars around in your yard?

A. No, sir.

Q. Do the crews that work around the yard, both the railroad crew and the maintenance crew, come under your jurisdiction?

A. Not the train crews and yardmaster.

(358) Q. What, if any, instructions or orders do your train crews take from the Pennsylvania Railroad?

A. There are no instructions; no instructions in respect to their action or time—no orders from the Pennsylvania Railroad.

Q. What is the practice, do they do it or not?

A. They do not do it.

The Court: Is there any arrangement for that under the contract?

Mr. Price: No, sir, no, the contract relates only to the maintenance of the tracks as a physical piece of property, but not the operation of the cars in and out.

By Mr. Price:

Q. What I want to find out, whether there was any overlapping of work by the crew; do they do the same work or separate kind of work, do they have to trespass on other properties, or work for each other, or work for themselves alone—describe how they function.

A. The Pennsylvania Railroad crew operates independently. There is no need for cooperation between our train crew and their train crew. Generally the Pennsylvania Railroad crew is on its own property in placing and removing cars from the plant.

Q. Can you tell us, approximately, how often they find (359) both yellow tracks filled with cars so that they have to use either one or two of your tracks?

A. Maybe once a month—in fact, I don't know when they last had to put cars on our tracks, on No. 1 and No. 2.

Q. Unless the two yellow tracks are completely filled, do they go on your tracks at all?

A. No.

Q. Do they have any reason or occasion to go on your tracks?

A. No, sir.

Mr. Price: Cross-examine.

Mr. Richter: May we take a few minutes' recess, Your Honor?

The Court: All right, a few minutes' recess, members of the jury. You can retire if you want, or stay where you are.

(Informal recess.)

CROSS-EXAMINATION

By Mr. Richter:

Q. Now, Mr. Shafer, you have been there a long time, and maybe you can help us out. When did the General Electric erect that building at 68th Street facing on Elmwood Avenue?

A. I can't answer, I am not certain of the building that you mean.

Q. This one, sir. (Indicating). Was that in the 30's (360) sometime?

A. No, before 1930.

Q. When?

A. From what is shown in this photograph the location looks like part of the original plant which would have been built probably in 1924 or 1925.

Q. You mean the General Electric built a plant closing a street that wasn't removed even by City Council until 1926?

A. I wouldn't say that. There isn't enough of the building on this photograph to spot it.

Q. You have been there all these years?

A. I have been there all these years, that is right.

Q. When you hire a crew from the Pennsy you say they say they sent four men in?

A. That is right.

Q. And you have four men in your crews?

A. No.

Q. Why did you hire four men crew from the Pennsy instead of the usual three-man crew?

A. I didn't specify the number of people.

Q. Do you know why they sent you four-man crew?

A. No.

Q. Is it because you need four to do the shifting?

A. I don't know specifically.

(361) Q. Do you need four men to do the shifting job?

A. No, we don't need four men in our yard, in our service.

Q. Do you know what particular move was being made—

A. On the two days they gave us service?

Q. Well, the move when this man was run over.

A. Yes, sir.

Q. You know they were moving east out of No. 10 building, and were looking, according to both of these men's

depositions, looking west for signals with nobody ahead of the locomotive to see what there was on the track ahead, so that with four men you would have a man in front?

A. It would be possible to have a fourth man at the head end of the locomotive; in our operation the engineman at the head of the string of cars, going in the direction the locomotive is headed, is considered a man at the head of the train.

Q. How could he look forward—

A. He takes alternate views, first in the direction he is going, and then behind.

Q. In other words, you think the job can be done with three men?

A. Yes, sir.

Q. Or should the engineer have sent a man ahead of him on the track?

(362) A. I can't say whether he should or not—I don't know any requirement—

Q. If a man was on the track working on a straightaway where he could be physically seen—

A. I think there is a curve involved.

Q. You know this is a straight track here. You have been there over thirty years and you know that track is straight.

A. That portion of the track is straight.

Mr. Price: If Your Honor please, I didn't ask this witness anything about the accident, and if Mr. Richter wants to ask him such questions I have no objection to asking him anything he wants so long as the witness is here, but I submit it is not cross-examination, and he has to ask him those questions as a part of his case.

The Court: Yes—

By Mr. Richter:

Q. You are the man in charge of those movements?

A. Yes, sir.

Q. And they are supposed to be done according to the rules laid down by you?

A. According to the rules of the safety engineer—

Q. At any rate, we know when the Pennsy sent a crew in to do this work they sent four men?

A. Yes, sir.

(363) Q. And you paid for four men?

A. Yes, sir.

Q. There seems to be some difference as to what happens when some little shipper is doing this shipping and when your company is doing the shipping; when the little shipper makes a shipment he goes to the freight office—

A. Yes, sir.

Q. —and the bill-of-lading is made out at the freight yard and this stuff is loaded on the cars by the man at the shipping office, that is, the railroad man, is that right?

A. I believe so.

Q. And in this case where you are doing the shipping you do the job that the railroad ordinarily does at loading the cars?

A. That is correct.

Q. And then you move the cars to the spot where they want them?

A. Yes, sir.

Q. And you write out your bill-of-lading?

A. Yes, sir.

Q. And you load your own cars?

A. Yes, sir.

Q. And you unload your cars?

A. Yes, sir.

Q. Those are functions that the railroad usually does?

(364) A. No, sir—

Q. That is what they do when anybody else ships?

A. No—there are two different routines, one routine applying to the small shipper, where the shipments are taken to the freight station, and the other applying to large industries where for convenience of both the transportation agency and the industry they are permitted to load their own cars and prepare their own bills-of-lading.

I imagine that there could be some industries—although this is an assumption on my part—where they do the same as we do.

Q. Is your railroad incorporated as a railroad?

The Court: One minute, Mr. Richter, please.

Mr. Richter: Surely.

By the Court:

Q. Is that done both for the convenience of the railroad and the convenience of the shipper?

A. Our routine?

Q. Yes.

A. I would say yes, sir.

Q. And the little man, a coal dealer or a lumber yard, that would be up to the railroad company—

A. It would take hours to prepare the bills-of-lading at the freight station.

(365) Q. And your concern, as well as other large similar concerns, have adopted this method for the mutual convenience of the parties?

A. Yes, sir.

The Court: That is what I wanted to get.

By Mr. Richter:

Q. Is your railroad incorporated as a railroad?

A. No, sir.

Q. It is not. You are familiar with Bethlehem Steel, United States Steel, and many other important shippers that have yards similar to yours that have incorporated their railroad?

A. I believe some have.

Q. The Conemaugh & Black Lick Railroad, the Aliquippa, and the Union Railroad, is that right?

A. I don't know.

Q. They were incorporated as railroads?

A. That could be, I don't know.

Q. And you don't move cars that have their brakes on?

A. Not intentionally.

Q. Because you would flatten—

A. I don't think you could move the car.

Q. It would flatten the wheels or wear out the brake rigging, is that right?

(366) A. Yes, sir.

Q. And you don't pull cars that have the air in them?

A. No, sir.

Q. Who takes care of that for the railroad in your yard?

Mr. Price: For what railroad?

Mr. Richter: For the Pennsylvania Railroad.

The Witness: We have no air on our operations.

By Mr. Richter:

Q. Who releases the brakes and makes sure that these cars are in shape so that the railroad equipment will not be damaged? I am talking about cars that are brought in your yard.

A. I have seen a member of the railroad train crew as he walks back the length of the cars that he places in there pull the valve on each car as he goes to the gate.

Q. You mean when the cars are ready to come out?

A. Being brought in.

Q. He releases the brakes on these cars when they move the cars into the yard?

A. The brakes are not fixed on the cars spotted in our yard.

Q. You leave the cars without brakes on?

A. Yes, in the yard.

Q. You leave the cars without brakes on them?

A. Yes, sir.

(367) Q. None of your people set the brakes on the cars?

A. No, sir.

Q. You are sure of that?

A. I am sure—the actual loading indoors, cars with large pieces of equipment, that is usually done in the side doors, and the loading is done from a flat car using a fork truck. In pushing large pieces of equipment in the end door

occasionally we set the brakes on them. That is the only operation that we perform in which we set the brakes on a car. The brake is released when we are ready to move the car.

Q. Is that one of the instructions you are under from the Pennsylvania Railroad?

A. That is the normal operation.

Q. Is that one of the instructions you are under from the Pennsylvania Railroad?

A. No, sir. I have no instructions from the Pennsylvania Railroad.

Q. Don't you know that this agreement says you are to follow the instructions of the company, the Public Utilities Commission and the Interstate Commerce Commission in regard to the operation of trains?

A. No.

Q. Didn't you know that?

A. No, sir.

(368) Q. Let me read this to you:

"The Industry further agrees that the provisions of State and Federal statutes, as well as the rules, regulations, and requirements of the Interstate Commerce Commission, or of the appropriate State Commission, with respect to the construction, maintenance, and operation of the Industry's said side-track, shall be complied with."

A. We comply with the State instructions.

Q. With what?

A. With the State instructions.

Q. Do you get any instructions from the Pennsylvania Railroad?

A. We comply with the regulations issued by the State of Pennsylvania.

Q. Do you get instructions from the Pennsylvania Railroad?

A. From the Pennsylvania Railroad, no, sir.

Q. You don't get any at all?

A. No, sir.

Q. By the way, when your merchandise is shipped out, is it shipped f.o.b. Philadelphia, your plant?

A. Either way, depending on the terms of sale and the material the customer buys.

Q. Is it shipped f.o.b. Philadelphia, your plant?

(369) A. Generally.

Q. In the vast majority of cases?

A. On straight commercial sales, yes, sir.

Q. And do you sometimes ship f.o.b. to customer's siding?

A. Very infrequently.

Q. That means that the title passes at your plant to the customer?

Mr. Price: That is objected to.

The Witness: Not necessarily.

By Mr. Richter:

Q. If it is f.o.b. your plant?

A. Not necessarily.

The Court: Strike the answer about the title passing, that would be a conclusion; strike that out.

By Mr. Richter:

Q. But the vast majority of cases the shipments are made f.o.b. Philadelphia, is that right?

A. I wouldn't say the vast majority; we also make shipments between our own plants.

Q. I am talking about when you ship merchandise to others other than yourself.

A. In the majority of cases they would be f.o.b. with freight allowed to destination.

Q. F.o.b. what?

A. Freight allowed to destination.

(370) Q. Meaning f.o.b. your plant?

A. Yes—

Mr. Richter: That is all, thank you.

Mr. Price: May I ask, Mr. Richter, what paragraph you were reading from, whether it was the third—

Mr. Richter: It says: "Third." I read the last sentence in the third paragraph.

Mr. Price: That relates to the industry side-track and not to cars at all.

The Court: Any questions you want to ask, Mr. Price?

Mr. Price: Did Your Honor have something?

The Court: Yes, but I didn't want to say anything until you finished.

Mr. Price: Go right ahead, do it now.

By the Court:

Q. Mr. Shafer, you have a regular crew of men down there in the yard, some oiling switches like this plaintiff was doing, removing debris, and so forth, and others shifting cars, loading cars and unloading cars, and you have something like two and a quarter miles of track with all that constitutes a railroad yard of that nature, who instructs the men who take over the responsibility for that very important work, who instructs these men in the technique of their job, are they trained men or green men? How did you organize the (371) force?

A. They were individually instructed by the supervisor; each individual assigned to a job is instructed in regard to his work by his supervisor.

Q. Would he be instructed in all the things that a railroad man should know?

A. That is right.

Q. And they were performing that type of railroad work out in the yard at that time?

A. The members of the train crew—

Q. At the time of this accident?

A. Yes, sir.

Q. Now, you spoke of one instance, maybe one or two, but the principle is the same whether it is one or two, where your Diesel engine broke down and you had to call upon the

Pennsylvania Railroad for assistance in shifting your cars in the yard. Mr. Price asked you if you paid for that and you said, oh, yes, that you paid for that; that would be charged up against a certain department in your accounting system?

A. Yes, sir, I believe it would be.

Q. You are very particular about that—you have three sections in your work, 1, 2, and 3; it used to be all one, but now there are three; you follow the system which is usually followed in modern business where there are three or more departments, and each particular branch of the service (372) or each department is charged with the things that are chargeable to it and credited with the things that are credited to it?

A. Among the three manufacturing departments?

Q. Yes, sir.

A. Yes, sir.

Q. This other witness was in charge of No. 1, and he was a very clear witness with his testimony, and the testimony you have given about this charge made by the Pennsylvania Railroad, I want to know if you carried that same system out in your plant.

A. At the time of the accident or at the time that we used the railroad company service?

Q. Yes, when you used the railroad company's services.

A. On these two days, we had only one big manufacturing department, so that the cost of the two days' service was absorbed in the one manufacturing department. Now, we have three departments, so that it would be divided among the three departments.

The Court: Thank you very much.

REDIRECT EXAMINATION

By Mr. Price:

Q. Mr. Shafer, you were asked about this particular industry handling its own paper work in the form of making

up bills-(373) of-lading and that sort of thing as distinguished from the small shipper who carries in or brings in a package and delivers it to the railroad and they make out the bill-of-lading, and you said this was a plant operation which was quite common in your industry; can you tell us whether that is covered by a tariff, or whether that is a recognized practice under Interstate Commerce Commission approval?

A. It is a recognized practice.

Q. Do you know whether there is a tariff specifically covering that?

A. I am not well enough acquainted with that to know the one that does cover it.

Mr. Price: All right, we will not ask you about that.

The Court: One more, the Pennsylvania Railroad takes your figures on that, when you prepare these bills-of-lading they accept your shipping weights? They take that at its face value?

The Witness: Yes, sir.

The Court: All right.

RECROSS-EXAMINATION

By Mr. Richter:

Q. Would you come down a minute, please.— Now, as I understand your testimony, the Pennsy crew comes in and out on (374) these first two tracks within the fence? (Indicating.)

A. That is right.

Q. I would like you to come over here and look at this picture a minute and tell the jury why you got a track, a lead track, running through the whole yard diagonally? Let me point out the track I am talking about and you explain it to the jury.

Mr. Price: Which picture is that?

Mr. Richter: P-7—it doesn't make any difference.

By Mr. Richter:

Q. Now, Mr. Shafer, there is the fence that I am pointing out. (Indicating.)

A. Yes, sir.

Q. And there is your first track? (Indicating.)

A. Yes.

Q. And here is your second track? (Indicating.)

A. Yes.

Q. Now, I am pointing beyond that to a lead track. Will you show them what track I am talking about, leading directly out on the main line?

(Witness indicates same to the jury.)

Q. Now, will you tell the jury why you have a lead track that goes near the first track if all you are interested in is the first two tracks?

(375) A. I had one glance at the photographs, but it occurs to me that that track is very rusty.

Mr. Price: Look at it and see where it goes, and what you use it for. Perhaps Mr. Richter will point the track out to you.

The Court: I don't know what the question is. I don't want to have a missing link.—

Mr. Richter: Let me show it to Your Honor.

The Court: Does the jury get it?

Mr. Richter: Your Honor, here is the fence and here is your track coming from the main line. (Indicating.) These are the only two that the Pennsy is supposed to be interested in. (Indicating.) I want to know why they got this lead track.

The Witness: I don't know why it is there, but I can tell it isn't used.

By Mr. Richter:

Q. It is right there with a switch?

A. Yes, sir.

Q. How long has it been there?

A. I wouldn't know.

Q. You have been there thirty years, and purport to know all about the railroad. Did you ever go out there?

A. Yes, I go out there very frequently.

(376) Q. And where is this? (Indicating on photograph.)

A. Toward the rear of the building overlooking the railroad yard.

Q. In that big building? (Indicating.)

A. Yes, sir.

Q. And there is noise in the building?

A. No.

Q. You mean they don't make much noise?

A. Well, they are factory buildings.—

Mr. Richter: That is all.

Redirect Examination

By Mr. Price:

Q. If No. 1 and No. 2 were completely filled with cars—I don't mean 1 and 2, I mean both of the yellow tracks on the plan next to the fence, were completely filled with cars, would you go to No. 1 and No. 2 in the G.E. plant, and how would you get to that track?

A. Either by the spur in question, or another spur which is further in the yard.

Q. Is there any way of getting on No. 1 and 2 except by the spur?

A. Either one, the spur at the gate and the one half-way down the yard.

Mr. Richter: There is a switch below?

(377) The Witness: Yes, sir.

By Mr. Price:

Q. If these yellow tracks were completely filled (indicating), you wouldn't go down in the yard? (Indicating.)

A. No, sir, in that case this spur would be used.

Q. Is there anything except that which leads from that end of the track into your Nos. 1 and 2?

A. No, sir, in that case this spur would be used.

Q. Is there anything except that which leads from that end of the track into your Nos. 1 and 2?

A. No, sir.

Q. That picture shows a lot of cars headed by a Diesel standing on a track just to the left of the row of lights (indicating). Are the row of lights on the property line?

A. Yes, sir.

Q. Separating the railroad from the General Electric?

A. That is right.

Q. They are the lights—I don't think anyone testified about that—the lower red line on this map? (Indicating.)

A. That is the property line.

Q. So that to the left of that row of lights as you look at this picture is the General Electric property and the right is the railroad property?

A. That is correct.

Q. And the string of cars standing on the track, they are standing on what number track?

A. No. 1.

(378) Q. That is No. 1 track which you said the Pennsylvania shoves cars on when the other two tracks are filled?

A. That is right.

Q. This track that Mr. Richter referred to as the lead track is the track that runs where the locomotive shows in the picture?

A. Yes.

Q. That is your No. 1 track?

A. Yes, sir.

Q. That track is the one on which cars are put in when the two yellow tracks are completed filled?

A. Yes, sir.

The Court: Was that track which you are just referring to leading off in here there when you first went there?

The Witness: I don't remember how much of the trackage was there when I first went there.

The Court: Have you known it for a long period of time?

The Witness: Yes, sir.

By Mr. Richter:

Q. When you were first asked about it you said it was rusty, and now you say it is used—

The Witness: I didn't say it was eing used, I (379) said it could be used.

The Court: It is part of the original plan, as far as you know?

The Witness: Yes, sir.

The Court: Very good. Anything more of Mr. Shafer?

Mr. Richter: That is all I have.

Mr. Price: That is all, Mr. Shafer, thank you.

The Court: Thank you.

Mr. Richter: One more question.

RECROSS-EXAMINATION

By Mr. Richter:

Q. You know that lead track—(indicating).

A. That is what I referred to as the spur or siding.

Q. Don't you know what a lead track is in railroading? Don't you know it is a track that leads—

A. We are not in the railroading business.

Q. Never heard of a lead track?

A. Never heard that expression before.

Q. You said it was a lead spur—

A. I mean this specific application.

Q. Do you mean that a lead track is a track that runs off the main track and feeds a number of tracks—

A. Our crew refer to them as a crossover.

(380) Q. A crossover? Don't you know there is a difference between a lead track and a crossover?

A. What do you mean?

Q. Do you know what a ladder track is?

A. No, we are not railroad people.

Q. You are not railroaders?

A. No.

Q. You run a railroad?

A. No, sir.

Q. Aren't you running a railroad?

A. Well, on a minor scale, it could be.

Q. Don't sit here and tell this court and jury that you obey the rules of the Pennsylvania State Commission in regard to—

A. Industrial railroads.

Mr. Price: He wasn't asked that question.

Mr. Richter: Yes, he said something about the Commission of Pennsylvania.

The Court: Let us get it straight.—

Mr. Price: May I object to the misstatement by Mr. Richter. The agreement that he read didn't apply to the operation of a railroad as a railroad; it applied to the maintenance of the tracks in accordance with the requirements of the Interstate Commerce Commission and Public Utilities (381) Commission or other regulatory body. That is what the witness was asked and answered before.

By Mr. Richter:

Q. Do you abide by any certain regulations of any State body in regard to the operation of this yard?

A. In respect to safety.

Q. And what body is that?

A. Well, it has the word "Pennsylvania" in it, and also State Industrial Railway.

Q. State Industrial Railways, I believe. They have a whole book of rules?

A. In respect to safety operation.

Q. In respect to what?

A. Safety operation.

Q. And you consider yourself bound by it?

A. Oh, absolutely.

Mr. Richter: That is all. Step down.

Mr. Price: Don't step down.

RE-DIRECT EXAMINATION

By Mr. Price:

Q. Let me show you this set of regulations. I show you a little pamphlet—

(The pamphlet referred to was marked as Defendant's Exhibit 12 for identification.)

(382) Q. —entitled, Commonwealth of Pennsylvania, Edward Martin, Governor, Department of Labor & Industry, William H. Chestnut, Secretary, Harrisburg, Regulations for Plaint-Railways, and ask you if that is the set of regulations you are talking about?

A. Yes, sir.

Q. And is that the set of regulations under which you operate?

A. Yes, sir.

Q. Are there any others except these under which you are operating?

A. No, sir.

Q. That is the only set of regulations you operate under?

A. Yes, sir.

Mr. Price: Unless Mr. Richter has any more questions, you may step down.

RE-CROSS-EXAMINATION

By Mr. Richter:

Q. Are you under railways?

A. Plant railways.

Q. Then, you are a railway to that extent?

A. Yes.

Mr. Richter: All right, come down, please.

Mr. Price: I will offer that pamphlet in evidence.

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(416) FRED J. POWERS, having been duly sworn, was examined and testified as follows:

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(418) CROSS-EXAMINATION

By Mr. Richter:

Q. You are the man to whom the engineer was looking to the rear for signals?

A. That is right.

Q. And looking toward the rear he naturally wouldn't be looking forward?

A. That is right.

Q. And your conductor was even further to the rear than you were?

A. He was around the bend, around the curve.

Q. Actually, at the time of the accident, there were two people on the scene, the engineer looking back toward you, and you were bringing him back, is that right?

A. That is right.

Q. You had a talk with Kelly a little while before about this (419) switch?

A. Yes, sir.

Q. And you knew that Kelly was going to be in that vicinity?

A. Yes, sir.

Q. Was the reason you didn't have anybody in front watching and looking out because you didn't have another man?

Mr. Price: If Your Honor, I object to this cross-examination.

Mr. Richter: You asked him about the moves.

Mr. Price: I didn't ask him anything about the accident.

Mr. Richter: You asked him about the move.

Mr. Price: I didn't ask him anything about the accident, except that he didn't see it. All I asked him about were the instructions that he got and who gave him the instructions, and nothing about the accident or how it happened, I have no objection to asking him any questions he wants, but I submit they should be asked as part of his examination.

Mr. Richter: I think I can ask any questions relative why he didn't have a man on the rear of the locomotive.

Mr. Price: If Your Honor please,—

Mr. Richter: Mr. Price opened the door on his direct examination.

The Court: I think the general nature of your examination (420) is broad enough to ask that question.—

Mr. Richter: Will you read the question?

(The reporter read the question as above recorded.)

By Mr. Richter:

Q. Is that right?

A. That is right.

Q. You got to the accident as soon as it happened?

A. That is right.

Q. You ran right over?

A. I ran right over.

Q. How far were you from the locomotive when you heard the screaming?

A. Oh, 50 yards, or 60 yards.

Q. When you got there did Mr. Kelly say a single word about the accident? Anything about how it happened?

Mr. Price: That is objected to, not cross-examination. He is my witness now,—

The Court: Wait a minute. He can answer "Yes" or "No", whether he said a word.

Mr. Richter: All right.

The Court: And when it comes to the next question I want the witness to pause so that Mr. Price can have an opportunity to pass on it.

You can answer "Yes" or "No".

Mr. Price: Exception.

(421) Mr. Richter: Did he?

The Witness: I don't recall.

The Court: Did Mr. Kelly say anything about the accident? Did he say anything?

The Witness: No.

The Court: What is your next question?

Mr. Richter: Will Your Honor bear with me just a minute, please.

By Mr. Richter:

Q. Perhaps you will recall better if I—remember my taking your testimony under oath in my office?

A. Yes.

Q. Did he at any time in your presence discuss the accident or how it happened, or what they were doing? And your answer was—

Mr. Price: I object to this.

Mr. Richter: And your answer was—

The Court: Wait a minute.

Mr. Richter: If Your Honor please, he said he didn't recall, and I want to help him to recall.

The Court: Wait a minute, I will have to pass on that; even if it was said on another occasion, he has now said "No".

Mr. Richter: He said, I don't recall, and I want to (422) see if I can refresh his recollection, because he gave a specific answer at that time.

Mr. Price: If you will read the Court's question just now.

(The reporter read the question as follows:

"By The Court:

"Did Mr. Kelly say anything at all about the accident? Did he say anything?

"A. No.")

Mr. Richter: That is all right, I probably didn't hear Your Honor's question. That is what I was trying to develop.

The Court: He said "No".

Mr. Richter: If he said "No" that is all I have. That is what I have been trying to develop.

Mr. Price: Mr. Steve Monaghan.

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(431) ANTHONY M. MILLER, having been duly sworn, was examined and testified as follows:

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(435) CROSS-EXAMINATION

By Mr. Richter:

Q. Where did you see that?

A. Here.

(436) Q. And where did you see it besides here?

A. That is the only place.

Q. Were you at Mr. Price's office?

A. Yes, sir.

Q. When?

A. Friday.

Q. Was it there, too?

A. No.

Q. What did you talk about?

A. Pardon?

Q. What did you talk about over there?

A. I didn't talk.

Q. Were you asked any questions?

A. I waited to come to court.

Q. Why did you come here?

A. I had instructions to come here.

Q. Who instructed you?

A. Our safety engineer, Mr. Scott.

Q. And who is he?

A. The gentleman sitting there (indicating), with glasses and light suit.

Mr. Richter: Stand up, Mr. Scott, please.

(A man rises.)

By Mr. Richter:

(437) Q. The General Electric man told you to go there?

A. That is right.

Mr. Richter: That is all.

Mr. Price: That is all, thank you, Mr. Miller.

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(442) JAMES McTAMENEY having been duly sworn, was examined and testified as follows:

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(444) CROSS-EXAMINATION

(445) By Mr. Richter:

Q. When were you first spoken to about this, Mr. McTameney?

A. I don't know—not until I heard about the case coming up.

Q. And how long was that?

A. A couple weeks—it is hardly a couple weeks.

Q. A couple weeks?

A. That is right.

Q. That is before the case came up?

A. I think the case was on, as far as I know.

Q. It was, at least, two weeks ago?

A. I couldn't tell.

Q. You have been here since this case started?

A. Yes, I was here the first day.
Q: You were here the first day?
A. Yes, sir.
Q. Were you here before Mr. Kelly testified?
A. I couldn't hear any more—I have deaf ears.
Q. And did you go over there to Mr. Price's?
A. Yes, I was there.
Q. Did they talk to you?
A. Not one single word.
Q. Not one single word?
A. Not one single word.
(446) Q. And put you on the stand—
A. I am here to tell the truth.
Q. —without knowing what you were going to tell?
A. Exactly—I can't tell no lies about it.
Q. Who asked you to come here?
A. Mr. Scott.
Q. And nobody asked you about—
A. No questions.
Q. About what you were going to tell?
A. Not a word.

The Court: Did you sign any statement?

The Witness: Nothing at all.

By Mr. Richter:

Q. No signed statement, and they had no way of knowing what you were going to say?
A. No.

Mr. Richter: O.K.

Mr. Price: That is all, Mr. McTameney.

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(508) PLAINTIFF'S POINTS FOR CHARGE.

The learned Trial Judge is respectfully requested to charge the jury as follows:

This is a suit being brought by Mr. William Kelly against the Pennsylvania Railroad Company. It is a suit under an Act of Congress known as the Federal Employer's

Liability Act. It is an Act of Congress which was passed some forty-five years ago and amended through the years in the interest of men who are injured while employed in the railroad industry whose work is interstate in character and where they work for a railroad which is a common carrier. Under the evidence in this case, it is clear that the plaintiff's (509) work is railroad work and the evidence would support a finding that his work is interstate in character.

The major issue before you insofar as a determination of whether this federal statute applies to Mr. Kelly is whether he was at the time of the accident an employee of the Pennsylvania Railroad Company. The decision as to that question is under the evidence of this case a question of fact for you to decide.

There is no doubt he was hired by the General Electric Company. There is also no doubt that he was paid by the General Electric Company. Indeed, you might well find that he thought he was a General Electric employee. All those facts are for you to consider; but they are not conclusive in any way or determinative of the issue involved. The test of whether a man is an employee of another is whether the alleged master has the "right to control" the individual who claims to be his employee. That is the test laid down by the law.

There are occasions when by operation of the law a man becomes the employee of another unbeknown to himself. In this case, there is evidence from which you could find that the plaintiff was directed to repair and maintain and keep in good condition *all* of the tracks within this yard including the tracks which the Pennsylvania Railroad Company (510) admits were tracks that it used, owned and operated. Those were the two tracks nearest to the fence. There is evidence that the plaintiff was directed not only by his employer to do this, but that the defendant, The Pennsylvania Railroad Company's, conductor also directed the plaintiff to make repairs to the switch on that track and on a number of occasions directed him to remove debris from all various

other tracks throughout the yard. The conductor employed by the Pennsylvania Railroad Company is the boss of its operations in the yard. Certainly, he is the man who exercises the highest authority so far as the defendant, The Pennsylvania Railroad Company, is concerned in that yard. If you find that the plaintiff regularly did and was required to take orders from the Pennsylvania Railroad Company's conductor and did so because his superior at the General Electric Company ordered him to take orders from the Pennsylvania Railroad people and that the plaintiff was actually in the control of the Pennsylvania Railroad Company, then you may find he was its employee. From those facts you may find that the plaintiff was employed by the Pennsylvania Railroad Company.

The plaintiff, however, points to other additional facts. There is evidence which would indicate that these tracks when built and as constructed were built by the Pennsylvania Railroad Company and as indicated by the ordinances of (511) City Council which were requested by the Pennsylvania Railroad and passed on its behalf, were the very tracks involved in this accident, as were all the other tracks which came across 68th Street which was then a public highway. The Pennsylvania Railroad by its own admission was not only constructing but was going to and did operate and maintain these tracks.

There is no evidence whatsoever that there has ever been an ordinance passed since that date indicating that the Pennsylvania Railroad Company has withdrawn from that status. If, in fact, the Pennsylvania Railroad Company did construct and was as of the date of this accident maintaining and operating these tracks, then the railroad movements being performed there were its operations for which it would be responsible. If you find that in this case the General Electric Company was merely supplying help to the Pennsylvania Railroad Company to perform railroad work on Pennsylvania Railroad operations, which operations the Pennsylvania Railroad Company had a duty to perform, then regardless of who paid or who hired the plaintiff, you

could find that he was as a matter of fact the employee of the Pennsylvania Railroad Company in this case. The law looks to substance, not mere shadow. It looks beneath the surface. It looks to the actual facts to determine what the true status of the matter is. (512) The Pennsylvania Railroad Company on the public records has admitted that it maintains and operates these tracks and that the operations are its own. It was admitted by the defendant in its own case, when it called Mr. Myron Mausteller, who is its freight train master in this entire area, that the Pennsylvania Railroad Company had a duty under its tariffs to deliver without charge the individual freight cars to any point on any of these tracks within the yard that the General Electric wanted them placed. He testified that whenever the General Electric wishes it, the railroad company must shove and place the cars on the tracks wherever the industry desires them.

He also testified that there was no charge for respotting these cars at the initial spot. He testified that there was no charge for placing these cars at the various buildings where the industry desired the cars planted. He testified that all of this would have to be done as part of the duty of the railroad under the tariff for which it was being paid. He said that the General Electric may instruct the railroad to put the cars on specific tracks at specific doors at specific places. He gave as an illustration the operation done at the quartermaster depot in Philadelphia, where the Pennsylvania Railroad Company makes the initial placement of cars all over the quartermaster depot tracks (513) without any additional compensation other than what was paid when the cars were first shoved inside the gate. There is, however, no charge for the initial placement of the car no matter where the industry tells the railroad to place the individual car, whether that car be in the middle of a long string of cars or any other place. In other words, even if the industry tells the railroad to break up a train and take cars out of the middle of the train and distribute them to different points in the yard, the railroad company is obliged to do so and do

so without charge. Hence, the plaintiff's testimony that he has seen cars being pushed by the Pennsylvania Railroad Company over all the tracks in the yard is in conformance with what Mr. Mausteller said is the railroad's duty. We find that under Mr. Mausteller's testimony the railroad company was not only under a duty to place and put cars in whatever the industry wanted them but he also testified they were under a duty to remove them wherever they might be in the yard and to pick them up wherever they happened to be without charge. In this very case there was a movement of cars for the purpose of moving them out, putting them together so that they could be removed onto the main line of Pennsylvania Railroad.

Bearing in mind the ordinances which indicate that Pennsylvania Railroad Company is operating the trains (514) and maintaining these tracks in question, if Pennsylvania was moving cars all over this yard on the date of this accident over tracks under its control, then those persons who were maintaining these tracks may be found by you to be performing Pennsylvania Railroad Company work and as such were employees of the Pennsylvania Railroad Company regardless of who had hired them and who was paying them. That will be a question of fact for you to decide, bearing in mind that under the law if that is which is being done by the plaintiff is for the benefit of the railroad company and under the railroad company's control, then the railroad company is responsible to him as his employer just as though it had hired him and was paying him.

In this connection, it is important to remember that there is a special section of the Federal Employers' Liability Act written by Congress for the very purpose of preventing railroad companies my any means, plan, device or contract from avoiding their responsibility to such men who are actually performing regular railroad company work. Railroad companies may not exempt themselves from the responsibility as employer of such men and to the contrary, assert that they are the employees of a private industry or of an independent contractor.

(515) I am going to read that section of the statute to you because I think it may be of particular significance in this case. It is for you to determine whether under the facts of this case such efforts were being made by the railroad company to avoid its responsibility. Section 55 of the Act reads as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void:"

Was this a plan by the Pennsylvania Railroad Company to avoid its responsibility under this statute which was intended to provide protection to injured railroad employees in the course of their work doing railroad work? Was this a contract or device, the purpose of which was intended to enable the Pennsylvania Railroad Company to escape its responsibilities to this man as a railroad company employee? You must consider the nature of his work. Obviously, he was engaged in railroading. If he was actually performing work normally performed by the Pennsylvania Railroad Company, which it would have had to have someone else do for it if the plaintiff did not do it, that is, to help it maintain these tracks so that it could operate its trains over them, in the performance of what admittedly was its duty, then you may (516) find that the railroad company was his employer, whether it hired him or paid him, or not. It is for you to analyze all of the facts, those which are direct and those which you can conclude by reasonable inference from the facts that are proven. You must decide whether this is a mere device contrived by the railroad company in an effort to avoid its responsibility under the law to this man as one of its employees.

These ordinances of the City of Philadelphia may be of great importance in this case as they are an admission by the railroad company that it was going to operate and maintain these tracks and control the work being done on them in this yard. In the light of that admission, it is for you to

decide whether in fact the work being done generally, and in the particular instance in this case, was indeed a function of the railroad. You must bear in mind that what was being done at the moment was the assembling of a train which was to go out on the main line under the evidence in this case. Was that or was it not in fulfillment of the railroad's duty and in fulfillment of its normal business operation? Was the work which the plaintiff was performing the kind of work which had the plaintiff not been there the railroad company would have been obliged to send someone else to do in order to keep that track in proper condition so (517) that movements could be made and the railroad company fulfill its work as an interstate common carrier by railroad and enable it to fulfill its duty as a common carrier to the General Electric?

Now, it is contended by the railroad company that although the ordinance says that Pennsylvania Railroad Company was constructing, maintaining and operating these tracks over 68th Street "to and into", and these last two words are very important, the General Electric yard, that in actual fact it was not doing so. It is obvious that the Pennsylvania Railroad Company cannot assert that these tracks had not been operated and maintained by it at any time. The power to cross 68th Street at the time the tracks were constructed was a power which the City of Philadelphia could give to and only to a common carrier by railroad. 68th Street according to the evidence was at the time these tracks were constructed a public highway. This was not only an open highway but in fact the City of Philadelphia had installed a water main all the way up to the railroad company's main track in the bed of 68th Street. 68th Street had been dedicated to the public use and had been accepted as such. It was, therefore, a public highway and I charge you as a matter of law that as of the date the Pennsylvania Railroad obtained permission to, and these six tracks were constructed, the (518) General Electric Company had no power to construct these tracks or to maintain them or operate them over a public highway. General Electric is not

a public utility. It is not impressed with a public service. It is a private industry, the same as is the small candy store operator. The City Council could not have lawfully authorized General Electric to build these tracks over a public highway. General Electric does not have any power greater than nor could any rights or privileges be granted unto it by any public authority, not even the legislature, greater than that which any other ordinary private individual has.

Therefore, there is in the law no doubt that these tracks which admittedly ran to and into the General Electric yard were at the time they were constructed, tracks of the Pennsylvania Railroad. The Pennsylvania Railroad Company points to an Ordinance of City Council of 1926 in defense of its present position in this case. It says that this accident happened after 1926 and that by that ordinance that City Street, 68th Street, was vacated and taken off of the City Plan and that thereafter and as of the time that this accident happened the General Electric was the party that was maintaining and operating these tracks. That again becomes a question of fact. Assuming that the City of Philadelphia, its Council and Mayor had the power to vacate this (519) public highway so that it would become the property of the General Electric Company, nonetheless it is for you to say whether under all the evidence in this case the General Electric Company really did thereafter take over these tracks and did operate and maintain them without regard to the vacating of the Street. What new Acts did the General Electric Company do or perform which would indicate that it was doing something different than was done before the Street was vacated? What new operations has it been performing since 1926? What change in its relationship to its employees or to the men who worked in the yard? What new evidence is there of control by General Electric to indicate that after 1926 it took over control of these tracks and the operations being performed on them?

Let us look at the Pennsylvania Railroad situation. Did the Pennsylvania Railroad Company ever go to City Council and have it repeal the ordinances of 1923 and 1924 in which

it admitted that it was not only constructing but going to maintain and operate these tracks? No such ordinance has been introduced in evidence and you may presume that there is no such ordinance. So far as the ordinance books of the City of Philadelphia are concerned, we have nothing to show that the Pennsylvania Railroad ever gave up its power, its right and indeed its duty to maintain and operate these tracks (520) across what was 68th Street, the very tracks involved in this case.

Even if we assume the legality of the ordinance of 1926 vacating the street, that fact of itself does not prove that General Electric is operating, maintaining or controlling the tracks. It is for you to appraise all of the facts and see whether there has truly been any change in status between the parties here involved since the ordinance of 1926. In fact, we know that Mr. Mausteller has said the Pennsylvania Railroad Company even today has a duty when requested to move cars over all of these tracks throughout the yard in a performance of its work as a railroad company for which it is paid its freight charges under the tariffs published by the Interstate Commerce Commission. There is evidence that when Pennsylvania Railroad locomotives are in the yard all other moves must yield priority to them. Do these facts indicate that Pennsylvania Railroad Company has surrendered control of these tracks since 1926 or the very contrary?

In the case of BARKER ET AL. V. HARTMAN STEEL CO., 129 Pa. 551 (1889), a manufacturing company cannot acquire by a lease from a railroad company the right of eminent domain vested in the railroad company so as to be able to construct (521) and operate a railway upon the streets of a city even with the consent of the railroad company or the city. Therefore, I told you that in this case only the Pennsylvania Railroad Company could construct these tracks when they were constructed and it alone could control them.

In considering the question of the amount of control that the Pennsylvania Railroad Company exercised in this

case, you may refer to the only agreements between the parties introduced in evidence and dated 1925. That agreement is not binding on you in your determination of this question of employment but to the extent that it indicates control in the railroad you may accept those statements as admissions by the parties that the railroad company was in fact in control of these tracks. Thus, in the second paragraph of the agreement you will find that the railroad company has the final say as to who may use these tracks other than the parties thereto and that it alone must give written consent to any other industry or parties to use these tracks. Moreover, the railroad company imposed a duty on the General Electric Company to comply with the provisions of the various statutes of Pennsylvania and of the Federal Government as well as the rules, regulations and requirements of the Interstate Commerce Commission and of the various State Commissions with regard to the construction, maintenance and operation of (522) these tracks. The Supreme Court of the United States has held that the General Electric Company is not a common carrier by railroad in this operation and I so charge you. Obviously, there would be no reason to write this clause into this agreement insofar as there might be any attempt at regulation of these tracks by the Interstate Commerce Commission, since the Interstate Commerce Commission has no control over yard track operations which are owned exclusively by and controlled exclusively by an industry. It is only when those tracks are controlled by the railroad company that the Interstate Commerce Commission has any say over them. You may find from the facts that the parties believed that these tracks were controlled by the Pennsylvania Railroad Company because it is subject to Interstate Commerce Commission regulations on interstate commerce carriers by railroad. The parties incorporated such a requirement or duty upon the General Electric to comply with such regulations as the Interstate Commerce Commission might impose on the operation of these tracks. This may give you some help in deciding what General Electric and Pennsylvania Rail-

road themselves intended to be their respective rights and duties and as to who in fact controlled, maintained and operated these tracks.

There is evidence that cars were moved in this (523) yard with mixed ownership of the cargo and that some of the merchandise in those cars did not belong to the General Electric Company. Only a common carrier by railroad may or has the duty to move other people's merchandise. General Electric has no duty to move other people's merchandise. Nonetheless we find that those cars with merchandise belonging to persons other than General Electric were being moved around in the yard. This was work that would be done only by the Pennsylvania Railroad Company as a common carrier by railroad. Whose function was then being performed? If a General Electric locomotive moved such loads was it doing Pennsylvania Railroad Company's work? When these tracks were being maintained, were they being maintained so that movement of this kind could be done by the Pennsylvania Railroad Company in the performance of its duty as a common carrier by railroad?

When Mr. Kelly was repairing or maintaining the tracks or the switches involved in this case or in other switches or tracks generally in his work, was he or was he not furthering an interstate commerce railroad operation which was part of the duty of the railroad company as such to perform? Was he then an employee of the railroad without regard to whether he was on their books as such? In other words, you have to get down not to a question of labels but to the substance of the relationship between the parties.

(524) I am expressing no opinion one way or the other. It is for you to analyze all of these facts. I merely point to them, so that you may give them such weight as you believe just in the determination of those employee Mr. Kelly was in this railroad yard where he admittedly did nothing but railroad work.

It is the law of Pennsylvania that side tracks when connected with the main line of an interstate common carrier

by railroad constitute a part of the interstate railroad transportation facilities in the same manner as if they were constructed by the railroad company itself. The railroad's right of way and tracks are its private property but they are subject to public use. If some of the facilities constituting part of the transportation system of the railroad company are privately owned, they are nonetheless charged with public use and are subject to regulation by the State and if they form a part of the interstate operation they are subject to regulation by the Interstate Commerce Commission. Side tracks are among the works and appendages usual in the convenient operation of a railroad and I charge you that they are as a matter of law the facilities of such railroad even though privately owned. When they are connected with a line of the railroad company they are an integral part of the railroad system regardless of who owns them. As provided by the (525) Constitution of Pennsylvania they become public highways and hence are to be treated as such for the various aspects of the law.

A railroad need not be of any particular length to be a railroad, nor is it necessary that it shall run in or through any governmental district, or that it shall run only above or only below the surface of the land which it crosses; or that it shall use any particular kind of motive power. A railroad is a railroad which runs on a road of rails. It is admitted in this case that all of these tracks are of standard gauge, size and are exactly like the main line of the railroad itself. Clearly, as I have told you before the General Electric Company could not have been granted the power by the City of Philadelphia to run these tracks over 68th Street when they were constructed. Clearly, that power could then have been granted only to the Pennsylvania Railroad Company. By the terms of that ordinance it was granted only to the Pennsylvania Railroad Company. The law presumes legality of operation. It was lawful for the City to grant permission to the Pennsylvania Railroad Company to operate these tracks, to construct them and to maintain them. It would have been unlawful for the City to attempt to give this right

to a private party such as the General Electric Company when they were built. Where one is specially franchised by law to engage in a special (526) capacity and where one places another into position to act as though he were acting for him who was given such power by special franchise, the franchise holder will not be heard in law to say that the other was not acting for him. Here Pennsylvania Railroad as a public utility alone was or could be empowered to occupy a public highway with railroad tracks. Hence, there is no doubt that up until 1926, and as a matter of law I so charge you, the operation of these tracks over 68th Street was an operation of the Pennsylvania Railroad Company. It will be for you to say whether or not there was any change in the relationship between the parties after the ordinance of 1926 was passed vacating this street which will justify you in concluding that the Pennsylvania Railroad Company no longer retained control or the right to control this operation and was, therefore, not responsible as an employer of the men who performed these operations on those tracks.

In this connection you will bear in mind that no new agreement was ever executed as between the Pennsylvania Railroad Company and the General Electric Company after 1926 withdrawing control or the right to control or the duty to operate or maintain these tracks over 68th Street from the City of Philadelphia by the terms of which the Pennsylvania Railroad Company publicly or otherwise has indicated that after (527) 1926 it no longer maintained and operated these tracks.

From the failure to execute such agreements or to have such ordinances passed by the City of Philadelphia you may conclude that in fact there was no change in the relationship and that what was true before 1926 remained true up to and including the date of this accident. You may conclude that had there actually been a change of control from Pennsylvania Railroad Company to General Electric it would have been manifested in the same way that the original plan was executed: that Council would have been asked to repeal the ordinances of 1923 and 1924 and new agreements executed

between General Electric and Pennsylvania Railroad Company.

To the extent that the Railroad Company attempted by the agreement which it executed with the General Electric Company prior to 1926 to delegate the responsibility for maintenance, control and operation of these tracks over 68th Street to and into the General Electric Plant, I charge you as a matter of law that that was null and void as it was an attempt by the Pennsylvania Railroad Company to relieve itself of a lawful duty from which it could not be excused and for the responsibility of acts performed on which it could not be relieved. This was a non delegable duty which it could not by any means known to the law have been excepted from.

At the most this agreement was nothing more than (528) the appointing of the General Electric Company as the agent of the Pennsylvania Railroad Company, for whose acts the Pennsylvania Railroad Company was responsible and to whose employees it remained as the primary or statutory employer in accordance with the terms of the law applicable to railroad company employees.

In other words, the lawful duties and obligations owed by the railroad company to the public and to the men who were performing this railroad work regardless of by whom they were paid remained the responsibility of the railroad company from which it could not escape by any private agreements it may have made with General Electric Company. The sole issue before you is whether the defendant, the Pennsylvania Railroad Company, has come forward with evidence sufficient to persuade you that there was such a change after 1926 in the actual work and operation, that you believe that Mr. Kelly, and the other employees involved in this accident, was as a matter of practical fact not mere labels the employee of General Electric and not Pennsylvania Railroad and therefore not the employees of the railroad and hence not under this Federal Employers' Liability Act and hence cannot recover in this case. If you decide that as a practical fact the plaintiff has established

by the fair preponderance of the evidence that realistically and factually he is a railroad (529) employee you come to the next question.

If you decide that the plaintiff is not an employee of the Pennsylvania Railroad Company, then that ends the case and your verdict will be for the defendant and the plaintiff will recover no money at all. On the other hand, if you decide that the plaintiff and the engine crew were on the date of this accident employees of the Pennsylvania Railroad Company, then you apply the Federal Employers' Liability Act to this case.

Under this statute, an employee is entitled to recover for injuries sustained while in the course of his work when such injuries are caused in whole or in part by reason of the negligence of the railroad company. Such negligence may be the carelessness of a fellow employee such as the engineer, or the brakeman or conductor who were working on the locomotive involved in this case, or it may be due to the Railroad Company's failing to supply an adequate number of men in order to do the job which the men were directed to do. It may be its failure to promulgate adequate rules for the operation in question.

Negligence is the basis of this cause of action. The burden is upon the plaintiff to prove by the fair preponderance of the evidence that the injuries sustained by him were caused by reason of the negligence of the railroad company, its agents, servants or employees. Negligence has been (530) defined as the want of due care under the circumstances. Negligence may be either the doing of that which a reasonable man would not do under the circumstances or the failure to do that which a reasonable man under the circumstances would do. In this case, if you find that the operation was one which required four men or more instead of just three that were supplied, so that one man could be out on the tracks in advance of the movement of the locomotive in the direction in which it was going, so that he could be in a position to observe the condition on the tracks and the presence of other persons upon them and warn those people

or the locomotive engineer; and that the failure to have an additional man was a cause of this accident, then you may find that such failure to have such additional men was negligence and your verdict would be for the plaintiff.

Even if you decide that three men were adequate, if you believe that the engineer should have been looking in the direction in which he was moving his engine, if he was to act in a careful manner, and that his failure to maintain a lookout ahead was negligence, which in whole or in part caused this accident, then his failure to look out ahead would be negligence for which the plaintiff would be entitled to a verdict from your hands.

If you find that the failure to blow the whistle, (531) or ring the bell or blow the horn, or to keep ringing and blowing them as the vehicle was moving in the yard was negligence, and that such negligence was in whole or in part the cause of this accident, then your verdict would be for the plaintiff.

If you find that those who had control of this locomotive or the conductor who was in charge of the entire operation had failed to exercise reasonable care and control over the operation and that by reason of their failure to do so this accident was occasioned, then your verdict would be for the plaintiff.

The plaintiff need not prove each and every one of these various aspects of negligence. It is enough if he proves any one of them; and that any one of them contributed to, or was in whole or in part a cause of the injuries sustained by him. If the plaintiff has satisfied you to that extent by the preponderance of the evidence, then your verdict must be for the plaintiff.

Under this statute the plaintiff does not assume any of the risks of his employment. When he is sent out onto the tracks to fix a switch, he does not assume the risk that some fellow employee will be negligent or will be careless or will fail to do that which a reasonable person would do under the circumstances. He has a right to assume that his (532) fellow employees will be exercising due care under all of the

circumstances and will give him such warning as the circumstances demand so that he will be in a position to protect himself. The negligence of any fellow employee is the negligence of the railroad company. If any one of the members of the crew working on the locomotive or about it or with it were careless and produced or caused this injury to the plaintiff, your verdict would be for the plaintiff.

You then have to consider the question of whether the plaintiff himself was guilty of any contributory negligence. Contributory negligence is negligence of which a plaintiff himself is guilty which produces the injury. The burden of proving the plaintiff was guilty of contributory negligence is upon the defendant who must do so by a fair preponderance of the evidence. It must satisfy you by such preponderance of the evidence that there were things that the plaintiff did or failed to do which caused his injuries. Unquestionably, he was entitled to be out on the track performing the duties he was performing. The only manner in which he may be found guilty of contributory negligence would be his failure to hear or know of the approach of this locomotive.

If under all of the circumstances you believe he should have seen or heard this locomotive coming and failed to do so, then you may find that he was guilty of contributory (533) negligence in this case. But in deciding that question you must give due consideration to whether or not he could reasonably be expected to have heard the approach of this locomotive under all of the surrounding circumstances. If as he has testified there was a big crane working noisily in the immediate vicinity or that the buildings nearby emitted a large amount of noise and din so that it became difficult for nim to hear the approach or movement of this locomotive without a bell or whistle being blown, then his failure to hear the locomotive approach may not be negligence. In other words, it is for you to consider all of the circumstances and decide whether under all of them he should have heard the locomotive coming. If not, if he is justified in not having heard it coming because the locomotive noise was overcome

or smothered by the surrounding noise of the things immediately in the vicinity where he was working, then he would not be guilty of any contributory negligence.

Assuming, even that you decide that he is guilty of contributory negligence, however, that would be no bar to his recovery if you find that the railroad company was also negligent in whole or in part and that such negligence produced the plaintiff's injuries. Under those circumstances, it would be your duty to determine the full damages suffered by the plaintiff and then reduce percentage wise the full damages to (534) the extent that you believe the plaintiff's own negligence contributed to this accident. In so doing it would be for you to say whether he was guilty of any negligence at all in the first place and if so to what extent, whether it be one per cent contributory negligence or ninety-nine per cent contributory negligence. Of course, if the accident was wholly and exclusively the fault of the plaintiff, he may not recover at all. On the other hand, if the railroad company was also guilty of negligence and if such negligence in whole or in part caused the accident then there must be a verdict for the plaintiff in this case in some amount.

The mere fact that I have spoken on the subject of contributory negligence does not mean that I believe the plaintiff is guilty of contributory negligence, any more than the fact that I have spoken of negligence means that I believe that the defendant is guilty of negligence. It is for you to consider all of the facts in this case, the circumstances surrounding them, and decide for yourself first whether the railroad company is guilty of negligence in the manner in which this locomotive was being operated and secondly, whether the plaintiff was guilty of any contributory negligence in the manner in which he performed his duties.

You will remember that he testified that he was (535) obliged to look or face in the direction in which he was in order to do his job, in order to be able to properly work the wrench. You will also remember that the plaintiff testified that the conductor had told him to do work right out there

on the tracks on this particular switch. Therefore, you will decide whether or not in fact he did not have reason to rely upon the engineer or conductor looking out for him as well as expect to receive adequate notice or warning from them by means of a horn, whistle or bell that the locomotive was approaching. In considering the direction in which he was facing he naturally would be facing away from the direction in which this locomotive was coming. All of these facts are to be given such weight as you believe they bear and justify your attention and consideration.

Just as I have laid down certain rules in regard to whether the plaintiff was in the employ of the Pennsylvania Railroad Company, so you will apply the same rules of law to the other men who were working on the locomotive. They too were working on General Electric tracks and on General Electric equipment and were paid by General Electric. On the other hand, the same other factors would be likewise applicable to them and you will give them their respective weights in accordance with your own judgment, applying the law, as I gave it to you in reference to the plaintiff.

(536) Wherever I have stated any given fact, if it in any way differs from your own recollection of the facts, you will apply your recollection of the facts rather than mine. Where I have stated certain facts, you may remember other facts to the contrary, or other facts which you think outweigh the facts that I have mentioned. If you do, it will be for you to use your own recollection and to give whatever weight you believe any particular factor is entitled to under all of the facts of the case whether I have referred to it or not.

The law, however, you must take from me and accept it without contradiction or reservation. This case must be tried and decided by you without any sympathy or prejudice against either of the parties.

If you have decided that the plaintiff or the other men working on the locomotives were not employees of the Pennsylvania Railroad Company, then your verdict must be for the defendant. Assuming that you believe that the plaintiff was in actual fact under all the evidence an employee of the

railroad company and that those who were running the locomotive were also under all of the evidence employees of the railroad company, then you must decide whether there was any negligence. If you decide that there was no negligence on the part of the defendant which was the (537) cause of the plaintiff's injury, then your verdict would also be for the defendant.

If, however, you decide that all of the parties involved, the plaintiff and the men who were working the locomotive, were employees of the railroad company and that there was negligence on the part of fellow employees or on the part of the railroad company itself in regard to the failure to provide adequate help and that such negligence was in whole or in part the cause of the accident in this case, then your verdict will be for the plaintiff.

Having reached that point and if you do I now give you a statement of law as to the measure of damages to be applied in deciding what your verdict shall be and how to arrive at it.

This naturally deals with fair compensation for the losses sustained by the plaintiff for such period of time in the future as you believe they will continue to exist and of course for such losses as have existed from the date of the accident until the present time. This man has unquestionably suffered extremely serious injuries, most of which are permanent in character. Both of the amputations are right into the joints or sockets themselves. Naturally, they are extremely significant, serious and disabling. In addition, (538) you have heard considerable evidence which has not been contradicted in regard to the phantom pain and phantom sensations suffered by the plaintiff, Mr. Kelly throughout the day or night in the limbs that he no longer has. You will consider these complaints and evaluate them in accordance with what you think in your fair judgment they mean to him in deprivation of normal pleasures, comfort, relaxation and the enjoyment of life.

The Court has no yardstick by which to help you decide what a fair verdict would be for injuries such as those suf-

fered. You have had the hospital records offered in evidence. You have heard about the blood transfusions. You have heard about the operation that was performed to ligate one of the main veins so as to prevent an embolism by reason of the blood clot pulling free at one of the points of amputation and flowing either to the lung or to the heart. You have a fairly complete picture of how this accident and the subsequent injury have affected him daily in his social and business activities and how it has affected his disposition in his relationship to his wife and to his children. It is for you to evaluate all of these things.

It is now five and one-half years since this accident happened. There can be no doubt that there was a great deal of pain attached to the original injury. The (539) complaints that are present today, the disability, the distress, the inconvenience, the difficulty of getting about, and all of the things that are naturally attendant to an injury of this sort, including the embarrassment, are all things to which you must give due weight. You must bear in mind, of course, that these are complaints that come at all hours of the day and night. You will have to decide how severe they are, how constant or how frequently the episodes take place. Wherever they may be, you must arrive at a verdict which is fair, is full, is just and is adequate.

Mr. Kelly today is thirty-eight years old. He was obviously thirty-two or thirty-three years of age when the accident happened. If he has a normal expectancy of life of some additional thirty or thirty-two years, he will, of course, continue to feel the loss of his limbs and such attendant discomfort, inconvenience, distress and suffering through the remaining years of his life. There is no assurance that he would have lived through the full expectancy of life with or without this accident but those are facts to which you must give consideration and which you must decide for yourselves.

The Court has as I have told you before no yard-stick to measure what would be fair compensation. But we are certain that you will do what it is your duty to do and make

(540) an award which, as best we can, will make him whole. Of course, we cannot restore his limbs. That the Almighty alone can do. But to the extent that compensation by dollars and cents as a business proposition and it is that alone in cold dollars and cents that we can begin to recompense him for the losses sustained in this case, it becomes your duty to do so.

You render a verdict that you believe is just and is fair and is adequate for such period, however long you believe it will continue to be and for however long you think he will continue to suffer. You give him exactly what he is entitled to, no more, and on the other hand, no less. While your verdict is not to be one which penalizes anyone, it must at the same time adequately compensate the man.

The plaintiff has brought suit seeking damages in the sum of $325,000.00. That is the measure of damages which he assesses or believes his case to warrant. You, however, are not bound by his conclusions. You may decide that he is not entitled to any verdict at all. Or if he is entitled to a verdict that he is entitled to a verdict anywhere from $1.00 up to, but not in excess of $325,000.00. From the fact that I mention this sum does not mean that I believe that that is the very sum that you must render, or that you should render a verdict in his favor in any amount. But (541) so that you will understand, I make it again clear your verdict is not to be in excess of that sum. It must be based strictly upon the evidence in the case and what you have heard from the witness box and in accordance with the instructions on the law that I have given you. If you decide your verdict is for the plaintiff and in a sum certain it will be for you and you alone to reach that conclusion solely upon the evidence and nothing else.

DEFENDANT'S REQUEST FOR CHARGE

The learned Trial Judge is requested to charge the jury on behalf of the defendant as follows:

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(543) 6. The word "employee" as it is used in the statute has no peculiar meaning, but as our Supreme Court has said, "Congress used the words 'employe' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee." Robinson v. B. & O., 237 U.S. 84, 94 (1915).

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(546) Mr. Richter: If Your Honor please, may I just note for the record specifically, although Your Honor granted me an exception to each of the paragraphs Your Honor has taken from the jury any consideration of the effect of the ordinance and power of the various parties. That is the basis of one of my exceptions to Your Honor's charge, and refusal to charge as requested my points.

The Court: Yes, I didn't want to cover that again, we had enough irons in the fire, and I didn't want to get mixed up with something else.

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EXHIBIT P-3.

ORDINANCES AND CITY SOLICITOR'S OPINIONS, 1923, p. 215.

AN ORDINANCE.

To permit the Pennsylvania Railroad Company, lessee of the Philadelphia, Baltimore and Washington Railroad Company, to construct, operate and maintain two tracks or sidings across Sixty-eighth street, immediately southeast of the southeast right-of-way line of the Philadelphia, Baltimore and Washington Railroad Company, northwest of Glenmore street, in the Fortieth Ward.

SECTION 1. *The Council of the City of Philadelphia ordains,* That permission be, and is hereby granted the Pennsylvania Railroad Company, lessee of the Philadelphia, Baltimore and Washington Railroad Company, to construct, operate and maintain two tracks or sidings across Sixty-eighth street, immediately southeast of the southeast right-of-way line of the Philadelphia, Baltimore and Washington Railroad, northwest of Glenmore street, to and into the property of the General Electric Company, as shown on plan on file in the Department of Public Works, Bureau of Surveys: *Provided,* That the said tracks or sidings shall be laid under the supervision and direction of the Department of Public Works, Board of Highway Supervisors, and shall be removed upon the passage of an ordinance to that effect, without recourse against the City of Philadelphia for damages, either property, personal or otherwise: *And provided further,* That the Pennsylvania Railroad Company shall enter into an agreement with the City of Philadelphia, satisfactory to the City Solicitor,

to pay the additional cost of constructing a bridge on the line of Sixty-eighth street when and as same is built, occasioned by the necessity of spanning the tracks herein authorized: *And, provided further,* That the sum of fifty (50) dollars shall be first paid into the City Treasurer for the publication of this ordinance.

OFFICE, CLERK OF CITY COUNCIL.

Philadelphia, July 13, 1923:

This is to certify that the ordinance entitled "An Ordinance to permit the Pennsylvania Railroad Company, lessee of the Philadelphia, Baltimore and Washington Railroad Company, to construct, operate and maintain two tracks or sidings across Sixty-eighth street, immediately southeast of the southeast right-of-way line of the Philadelphia, Baltimore and Washington Railroad Company, northwest of Glenmore street in the Fortieth Ward," was presented to the Mayor on the twenty-ninth day of June, 1923, and was not returned to the Council at a meeting held July 12, 1923 (being more than ten days after it had been presented to him).

Wherefore, in pursuance of the provisions of the Act of Assembly approved June 25, 1919, entitled "An Act for the better government of cities of the first class of this Commonwealth," it becomes as effective as if the Mayor had approved it.

WILLIAM H. FELTON,
Clerk of Council.

EXHIBIT P-4.

ORDINANCES AND CITY SOLICITOR'S OPINIONS
1924, p. 359.

AN ORDINANCE.

To permit The Pennsylvania Railroad Company, lessee of The Philadelphia, Baltimore and Washington Railroad Company, to construct, operate and maintain four additional tracks across Sixty-eighth street, between the southeast right-of-way line of The Philadelphia, Baltimore and Washington Railroad Company and the southeast building line of Glenmore street, extended; also to change the location of the two tracks across said Sixty-eighth street, authorized by ordinance which became effective July 12, 1923.

SECTION 1. *The Council of the City of Philadelphia ordains*, That permission be, and is hereby granted The Pennsylvania Railroad Company, lessee of The Philadelphia, Baltimore and Washington Railroad Company, to construct, operate and maintain four additional tracks across Sixty-eighth street, between the southeast right-of-way line of The Philadelphia, Baltimore and Washington Railroad Company and the southeast building line of Glenmore street; extended; to and into property of the General Electric Company; also to change the location of the two tracks authorized to be constructed across said Sixty-eighth street by ordinance which became effective July 12, 1923, as shown on plan on file in the Department of Public Works, Bureau of Surveys: *Provided*, That the said four additional tracks and the change in location of the two tracks heretofore authorized shall be laid under the supervision and direction of the Department of Public Works,

Board of Highway Supervisors, and shall be removed upon the passage of an ordinance to that effect, without recourse against the City of Philadelphia for damages, either property, personal or otherwise: *And provided further*, That The Pennsylvania Railroad Company shall enter into a supplemental agreement with the City of Philadelphia, satisfactory to the City Solicitor, to pay the additional cost of constructing a bridge on the line of Sixty-eighth street when and as the same is built, occasioned by the necessity of spanning the four additional tracks herein authorized, as well as the two tracks heretofore authorized: *And provided further*, That the sum of fifty (50) dollars shall be first paid into the City Treasury for the publication of this ordinance.

Approved the twenty-third day of July, A. D. 1924.

W. FREELAND KENDRICK,
Mayor of Philadelphia.

AN ORDINANCE.

To permit The Pennsylvania Railroad Company, lessee of The Philadelphia, Baltimore and Washington Railroad Company, to construct, operate and maintain four additional tracks across Sixty-eighth street, between the southeast right-of-way line of The Philadelphia, Baltimore and Washington Railroad Company and the southeast building line of Glenmore street, extended; also to change the location of the two tracks across said Sixty-eighth street, authorized by ordinance which became effective July 12, 1923.

SECTION 1. *The Council of the City of Philadelphia ordains*, That permission be, and is hereby granted The

Pennsylvania Railroad Company, lessee of The Philadelphia, I ltimore and Washington Railroad Company, to construct, operate and maintain four additional tracks across Sixty-eighth street, between the southeast right-of-way line of The Philadelphia, Baltimore and Washington Railroad Company and the southeast building line of Glenmore street, extended; to and into property of the General Electric Company; also to change the location of the two tracks authorized to be constructed across said Sixty-eighth street by ordinance which became effective July 12, 1923, as shown on plan on file in the Department of Public Works, Bureau of Surveys: *Provided,* That the said four additional tracks and the change in location of the two tracks heretofore authorized shall be laid under the supervision and direction of the Department of Public Works. Board of Highway Supervisors, and shall be removed upon the passage of an ordinance to that effect, without recourse against the City of Philadelphia for damages, either property, personal or otherwise: *And provided further,* That The Pennsylvania Railroad Company shall enter into a supplemental agreement with the City of Philadelphia, satisfactory to the City Solicitor, to pay the additional cost of constructing a bridge on the line of Sixty-eighth street when and as the same is built, occasioned by the necessity of spanning the four additional tracks herein authorized, as well as the two tracks heretofore authorized: *And provided further,* That the sum of fifty (50) dollars shall be first paid into the City Treasury for the publication of this ordinance.

Approved the twenty-third day of July, A. D. 1924.

W. FREELAND KENDRICK,
Mayor of Philadelphia.

Office - Supreme Court, U.S.
FILED
OCT 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 529

WILLIAM KELLY,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

B. Nathaniel Richter,
Theodore H. Lunine,
Richter, Lord & Levy,
Counsel for Petitioner.

121 South Broad Street,
Philadelphia 7, Pa.

International, 711 So. 50th St., Phila. 43, Pa.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No.

WILLIAM KELLY,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

WILLIAM KELLY, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 16, 1957.

OPINION BELOW.

The opinion of the Court of Appeals is to be found in 245 F. 2d 408 (C. A. 3, 1957). This is the final judgment of the United States Court of Appeals reversing the judgment of, and remanding the case to, the United States District Court for the Eastern District of Pennsylvania with instructions to enter judgment for the defendant-appellant.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 16, 1957. A timely petition for rehearing was denied on July 8, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where a franchised common carrier by railroad in interstate commerce pursuant to contract knowingly permits and enables a manufacturing corporation, which owns and operates what it claims to be a private railroad without a common carrier railroad franchise, to connect the manufacturer's tracks with the franchised carrier's interstate tracks and consequently to operate in interstate commerce without having first complied with the legal requirement of obtaining a franchise to do so, and a railroad worker of the manufacturer is seriously injured as a result of the negligence of fellow employees in the course of their railroading duties, did not the franchised common carrier by operation of common law principles of tort law, followed universally in all state and federal courts, become liable as the employer of such manufacturer's injured railroad employee under the Federal Employers' Liability Act (45 U. S. C. § 51, *et seq.*)?

2. Does not the decision in this case violate the right of the Commonwealth of Pennsylvania to regulate within its borders those activities of all railroads which form part of the stream of interstate and intrastate commerce in Pennsylvania as to which Congress has not legislated?

THE STATUTE INVOLVED.

The Federal Employers' Liability Act, Act of April 22, 1908, C. 149, Sec. 1, 35 Stat. 65, as amended by the Act of Aug. 11, 1939, C. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. § 51 *et seq.*, the pertinent portion of which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier. . . ."

STATEMENT OF THE CASE.

On March 1, 1949, plaintiff, a laborer employed by the General Electric Company as a maintenance worker on its railroad in West Philadelphia, Pennsylvania (44a), was struck by a shifting engine owned by General Electric and operated by an engineman employed by General Electric (6a, 50a). The engineman was looking backward to get the signals instead of ahead in the direction in which he was moving (19a). He blew no bell or whistle (23a). He had a clear view; if he had been looking ahead he would have seen the plaintiff who was working on a switch. Plaintiff suffered the loss of his left arm and leg and other injuries when he was run down by the engine (25b).

The United States District Court for the Eastern District of Pennsylvania (Welsh, J.) entered judgment upon a jury verdict in favor of plaintiff. The Court of Appeals for the Third Circuit reversed and remanded the case to the District Court with instructions to enter judgment for the defendant-appellant. Plaintiff-appellee's petition for rehearing was denied and the present petition for certiorari followed.

There remains no factual issue pertaining to negligence or damages in this case. Nor is there any material dispute

concerning the facts surrounding the only question remaining in this case, namely, the legal question of whether defendant-respondent, the Pennsylvania Railroad, is responsible as a matter of law, or at least as a question of fact, as "employer" to plaintiff within the purview of the Federal Employers' Liability Act for the injuries sustained by him as a result of the negligent conduct of his fellow employees similarly employed.

The relevant facts are these: General Electric is not incorporated as a railroad company or franchised to operate a railroad (106a). General Electric has operated a railroad in West Philadelphia. This unfranchised railroad does the work of an interstate carrier by rail pursuant to contractual arrangements with and the authorization, permission, and cooperation of the Pennsylvania Railroad Company. It has direct connections with the Pennsylvania Railroad tracks. Indeed, the Pennsylvania Railroad had for thirty years moved cars on General Electric's "private" tracks on occasions when the Railroad's interchange tracks were full (41a, 96a-97a).

All of the tracks in the General Electric Company yard were constructed pursuant to private ordinances passed by the City Council of Philadelphia on July 12, 1923, and July 23, 1924. These ordinances granted only to the *Pennsylvania Railroad Company* permission "to construct, operate and maintain" at first two tracks and later four additional tracks across a public highway known as 68th Street "to and into" the General Electric plant. 68th Street at that point had been officially and formally dedicated to the City of Philadelphia (124b-128b). Only a public utility may lay tracks on a public highway in Pennsylvania.

South of the main tracks of the Pennsylvania Railroad is a fence known as the General Electric fence. It is on land owned by The Pennsylvania Railroad Company. There is a gate in this fence through which cars coming off the main line of the Pennsylvania Railroad must pass

to get into the General Electric railroad yard in question. The key to the gate in this fence is in the exclusive custody and control of the Pennsylvania Railroad conductor (45a).

General Electric at the time of the accident operated and maintained in West Philadelphia a railroad consisting of approximately two and one-quarter miles of trackage (89a), two diesel engines and a number of freight cars (88a). It hired its own train crews which sometimes operated under the direction and control of its own supervisors (88a, 97a) and at other times under the direction and control of the regular Pennsylvania Railroad crew (41a-42a). General Electric with its own equipment weighed its outgoing freight shipments (136a) for the Pennsylvania Railroad's billing purposes, thus performing part of the work for which the Pennsylvania Railroad was paid under its tariff charge, (94a-95a).

Plaintiff's duties were in the General Electric railroad yard where he cleaned up debris, kept the switches oiled and working, and looked for loose bolts on railroad ties (44a). At the moment of the accident he was correcting a switch across which, among others, a loaded car was to be moved to be weighed on General Electric's scales (136a), a non-delegable duty of the Railroad for which it was paid under its tariff charge. There was an agreement between the Pennsylvania Railroad and General Electric, dated May 14, 1925, providing, *inter alia*, for the connection of General Electric's tracks with those of the Pennsylvania Railroad (181a-189a). Secondly, there is the contractual arrangement between the Railroad and General Electric whereby (1) the Railroad daily delivers freight cars, both loaded and empty, to and removes outbound cars from, the General Electric interchange tracks and (2) General Electric daily moves these cars to various points on its yard tracks and interchange trucks, outbound on the initial stage of their interstate journey and inbound on the final leg of their interstate journey under Pennsylvania Railroad

tariffs (28a-31a, 37a, 41a, 93a-94a). For all of this the Pennsylvania Railroad was paid (120a-122a).

In paragraph Third of the Agreement of 1925 General Electric promised to comply with all state and federal statutes and regulations. This it failed to do, as is shown *infra*. Paragraph Third reads (182a-183a):

> "Third: The Industry will secure and assume the expense of securing and complying with any necessary ordinance, order, permit, or consent from any public authority for the construction, maintenance, and operation of the said side-track. The Industry agrees that it will, at its own expense, provide any bond required by such public authority and will also assume any tax, assessment, or license fee now or hereafter levied because of the occupancy of any public property or thoroughfare by the said side-track. The Industry further agrees that the provisions of State and Federal statutes, as well as the rules, regulations, and requirements of the Interstate Commerce Commission, or of the appropriate State Commission, with respect to the construction, maintenance, and operation of the Industry's said side-track, shall be complied with."

REASONS FOR GRANTING THE WRIT.

1. This decision denies to a substantial segment of railroad employees engaged in interstate commerce the benefits provided by the F. E. L. A. in cases where a franchised interstate common carrier permits an unfranchised private railroad to connect with its interstate lines, knowing that the private railroad has failed to obtain a common carrier railroad franchise as required by State Constitution and statute.

2. This decision rejects the universally accepted rule (A. L. I., Restatement, Torts, § 428) that a publicly fran-

chised carrier is by operation of law responsible for the negligent conduct of an unfranchised private carrier, where the franchised carrier permits and enables the private carrier to perform activities which may be lawfully carried on only under a public franchise; and this is so even though such parties may be independent contractors as between themselves.

3. This decision permits the respondent, a franchised common carrier by railroad, to delegate legally non-delegable franchise duties to an unfranchised private connecting railroad and at the same time avoid its responsibility to the latter's employees imposed by the F. E. L. A.

4. This decision permits a private railroad to connect with the lines of an interstate common carrier and to operate as an independent contractor without a common carrier railroad franchise, in violation of the Constitution of Pennsylvania, Article 17, § 1 and the Pennsylvania Act of April 15, 1851, P. L. [1852] 720, § 7, 67 P. S. § 363.

5. This decision is in conflict with the decision of this Court in *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 34 S. Ct. 305 (1914).

6. This decision is in conflict in principle with the decision of the same Court of Appeals (Third Circuit) in *Kach v. Monessen Southwestern Ry. Co.*, 151 F. 2d 400. (C. A. 3, 1945).

7. This decision violates the right of a State to regulate those phases of interstate commerce by railroad within its borders as to which Congress has not exercised its constitutional supremacy.

ARGUMENT.

I. In the Circumstances Here Involved the Pennsylvania Railroad Company Is as a Matter of Law Under the Federal Employers' Liability Act Liable to All Railroad Employees of the General Electric Company Engaged in the Furtherance of Interstate Commerce, and to Plaintiff in Particular, Injured Through the Negligence of the General Electric Company in the Operation of Its Private Connecting Railroad.

Petitioner Kelly lost two limbs and suffered other injuries as a result of being run down by a railroad engine while he was working on a railroad switch. At the time of the accident Kelly was employed as a railroad worker in the furtherance of interstate commerce on General Electric Company's private intra-plant railroad in West Philadelphia, Pennsylvania. In its railroad operation General Electric was unquestionably engaged in interstate commerce, as is demonstrated later in this petition.

Kelly brought an action against General Electric under the Federal Employers' Liability Act, cited *supra*, in which summary judgment was entered against him on the stated ground that the circumstances of General Electric's railroad operation did not make it a "common carrier" within the purview of the Act. *Kelly v. General Electric Company*, 110 F. Supp. 4 (E. D. Pa. 1953), aff'd per curiam 204 F. 2d 692 (C. A. 3, 1953), cert. den. 346 U. S. 886, 74 S. Ct. 137 (1953).

Kelly also brought the present action against the Pennsylvania Railroad Company in which he was awarded a substantial jury verdict in the District Court for the Eastern District of Pennsylvania. The judgment entered on that jury verdict amply supported by the record was reversed by the Court of Appeals for the Third Circuit principally on the ground that the Pennsylvania Railroad Company was as a matter of law not Kelly's employer. The Court of Appeals peremptorily and, we submit, errone-

ously overruled our alternative position which became the sole contention in Kelly's petition for rehearing in the Court below and is presently the only question we raise before this Court. Our contention is this:

A. It Would Have Been Illegal for General Electric Company to Connect With the Pennsylvania Railroad Company's Tracks and to Operate Its Connecting Railroad Without a Franchise From the Commonwealth of Pennsylvania, Unless General Electric Under Applicable Law Is Considered to Have Acted as the Pennsylvania Railroad's Agent in the Performance of Those Activities.

We would like to make absolutely clear that it is not our position that General Electric committed an unlawful act in connecting its tracks with those of the Pennsylvania Railroad and in operating a "private" interstate connecting railroad without a franchise from the state. Nor is it our contention that the Pennsylvania Railroad acted unlawfully in permitting and facilitating this connection and operation by General Electric. What we are contending is that General Electric's conduct can be construed in two ways, one lawful and the other unlawful. And, as the Supreme Court of Pennsylvania has repeatedly held, " 'If specified conduct, in one view, may be construed to be lawful, and in another, to be unlawful, the lawful construction shall be adopted: *Rau v. Wilkes-Barre & E. R. R. Co.*, 311 Pa. 510, 513, 167 A. 230; *Morgan v. Heinel Motor, Inc.*, 329 Pa. 360, 364, 197 A. 920; *Kimbel v. Wilson*, 352 Pa. 275, 42 A. 2d 526." *Kissell v. Motor Age Transit Lines*, 357 Pa. 204, 53 A. 2d 59[illegible] (1947).

This pronouncement was spelled out even more fully in the case of *Rau v. Wilkes-Barre & E. R. R. Co.*, 311 Pa. 510, 167 A. 230 (1933), where the Court said at page 513:

". . . but it is well settled that if conduct and words, said to be ambiguous, are susceptible of a lawful inter-

pretation and also of one that is unlawful, *the lawful interpretation must be accepted and applied:* (Citations). . . ." (Emphasis ours.)

This presumption is not unique in the laws of Pennsylvania. It is fundamental to the law of the land.

The Supreme Court of the United States said in *Cincinnati, N. O. & T. P. R. Co. v. Rankin,* 241 U. S. 319, 36 S. Ct. 555, 558 (1916):

". . . It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and, in respect of transactions in the ordinary course of business, it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniture esse acta, donec probetur in contrarium*' . . ."

If General Electric's railroad operations were construed to create for it the relationship of independent contrator with the Pennsylvania Railroad, those operations, being unfranchised, would be unlawful (as is demonstrated *infra*).

We shall see, however, that the applicable rule of tort law considers General Electric's railroad operations as lawful conduct by an agent on behalf of the Pennsylvania Railroad, a duly franchised common carrier by railroad in interstate commerce. The action of General Electric in undertaking the transportation movement of the car which struck plaintiff must be considered as that of an

agent acting on behalf of the Pennsylvania Railroad. It is undisputed that a carrier is liable for the negligence of an agent's or a licensee's employees under the Federal Employers' Liability Act. *Kansas City Southern Ry. Co. v. Nectaux*, 26 F. 2d 317 (C. C. A. 5, 1928), cert. den. 278 U. S. 621, 49 S. Ct. 24 (1928).

This is not a case where the doctrine of independent contractor is applicable. By virtue of its franchise as a common carrier by railroad, the Pennsylvania Railroad knowingly and deliberately permitted and enabled General Electric to connect its tracks with the Pennsylvania Railroad's interstate tracks and to operate its "private" railroad without a franchise required by State law, as is shown *infra*. General Electric in the performance of those franchise activities without a franchise and with the permission and full cooperation of the Pennsylvania Railroad, a franchised common carrier, must be treated as an *agent* of the Pennsylvania Railroad under common law. General Electric's railroad employees, including plaintiff, engaged in the furtherance of interstate commerce are therefore the Pennsylvania Railroad's "employees" within the meaning of the Federal Employers' Liability Act. Respondent Railroad is liable for injuries received by plaintiff as a result of the negligence of his fellow employees, also Pennsylvania Railroad "employees" within the meaning of the F. E. L. A.

In short, General Electric at the time Kelly received his injuries was doing Pennsylvania Railroad work, that is, performing duties under and by virtue of the Railroad's franchise. The negligent performance by General Electric of the Railroad's non-delegable franchise duties imposed liability upon the Railroad as an "employer" within the meaning of the F. E. L. A.

The Constitution and statutory law of Pennsylvania clearly make it unlawful for an independent contractor in Pennsylvania to connect its private tracks with those of

an interstate carrier without first having obtained a common carrier railroad franchise from the Commonwealth.

Article 17, Section 1 of the Constitution of Pennsylvania, provides that "*all railroad and canal companies shall be common carriers*" and that "*any association or corporation organized for the purpose [operating a railroad] shall have the right* to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other States . . . [and] *to connect with . . . any other railroad.*" (Emphasis supplied). The clear implication of this constitutional provision is that any railroad company *not* incorporated as a common carrier railroad shall *not* have the right to connect with common carrier railroads. This implication was made explicit by the Pennsylvania Act of 1851, April 15, P. L. [1852] 720, § 7, 67 P. S. § 363,[1] which declares unlawful and absolutely prohibits the connection of private railroads with common carrier railroads and, conversely, the connection of common carrier railroads with private railroads. The obvious purpose of the Pennsylvania Constitutional provision and statute in requiring all private railroad companies to incorporate as common carrier railroads as a condition precedent to their being legally permitted to connect with franchised common carrier railroads was to subject *all* railroads within the Commonwealth to uniform regulation.

---

1. "CONNECTION OF PRIVATE WITH PUBLIC RAILROADS PROHIBITED it shall not be lawful for any private individual, or association of individuals, or any company or companies, to construct a private railroad connecting with any railroad authorized to be constructed by the laws of this state, with the Ohio and New York state lines, or with any railroad constructed or to be constructed in the States of Ohio and New York; and it shall not be lawful for any railroad company authorized by the laws of this state to connect with any such private railroad; and any violation of the provisions of this act shall subject all individuals or association of individuals violating the same, to the jurisdiction of the courts of this state, and to such forfeiture as the legislature may hereafter direct. (1851, April 15, P. L. [1852] 720, § 7.)"

We submit that the Court of Appeals was in error in holding impliedly (Appendix, pp. 4a-5a, *infra*) that notwithstanding the specific language of the Act of 1851, cited *supra*, it was lawful for the General Electric Company *as an independent contractor* to connect with the Pennsylvania Railroad's tracks. We do not dispute the Court of Appeals' statement that "Both Pennsylvania Statutes [citing, in footnote 2, Pa. Stat. Ann. tit. 66, § 1176 (Purdon 1941)]; *Id.* tit. 67, § 472, § 781 et seq. (Purdon 1930) and the federal Interstate Commerce Act [citing, in footnote 3, 49 U. S. C. A. § 1(9)] recognize the existence of lateral railroads and private sidetracks and require common carriers to connect with them.'" (Appendix, p. 5a, *infra*). But it is perfectly obvious from a reading of these statutes cited by the Court of Appeals and the cases decided thereunder that they are irrelevant to the problem of the right of a connecting railroad to operate and maintain its own engines, rolling stock, and other railroad equipment with its own crews on its own tracks *without first having incorporated as a railroad company and hence without having subjected itself to the rules and regulations of the Pennsylvania Public Utilities Commission, the Interstate Commerce Commission and the several Federal Statutes governing interstate railroads and particularly the Federal Employers' Liability Act.* The statutes cited in footnotes 2 and 3 of the Court of Appeals' opinion (Appendix, p. 5a, *infra*), merely require common carrier railroads to construct, maintain and operate switch connections with commercial sidings, that is, shippers' side tracks, where there will be sufficient business to justify the furnishing of such connection and service by the common carrier. These statutes merely order the extension of the *common carriers'* facilities into private plants. *They do not authorize and do not refer or apply to the engagement by an industry in the operation of its private railroad*, including the operation and maintenance of railroad engines and roll-

ing stock and the employment of train crews and other railroad workers. It should not require argument to establish our point that merely owning and maintaining a sidetrack or a lateral railroad track by an industry does not put that industry in the railroad business; but the operation of a complete self-contained, private connecting railroad in interstate commerce by the General Electric Company does put General Electric in forbidden railroad business unless it is acting as the agent of the Pennsylvania Railroad.

The Commonwealth of Pennsylvania has attempted to subject to regulation all railroads within its borders, both public and private, by the above cited constitutional provision. In order to compel private railroads to incorporate as common carrier railroads and thereby subject themselves to State regulation, Pennsylvania has prohibited and declared unlawful the *connection* of private railroads not incorporated (or franchised) as common carrier railroads (such as General Electric's unfranchised railroad) with franchised common carrier railroads (such as the Pennsylvania Railroad). General Electric, in violation of the Constitution (Article 17, Sec. 1) of Pennsylvania and the Act of 1851, cited *supra*, has failed to obtain a franchise to operate its private connecting railroad either by amending its own corporate charter or by forming a subsidiary railroad corporation.

There is no question that if General Electric Company or a subsidiary thereof *had* incorporated as a railroad company, as it was legally required to do under the above-cited Pennsylvania constitutional and statutory provisions, for the purpose of operating its intra-plant railroad directly connecting with the tracks and facilities of the Pennsylvania Railroad, General Electric or its subsidiary would have to be considered a common carrier by railroad in interstate commerce both under the Constitution of Pennsylvania and within the purview of the Federal Employ-

ers' Liability Act. Constitution of Pennsylvania, Article 17, § 1; *Kach v. Monessen Southwestern Ry. Co.*, 151 F. 2d 400 (C. A. 3, 1945).

In *Kach* defendant's operation was largely confined to the movement of freight cars into and out of the works of the steel company, of which defendant was a wholly owned subsidiary. These movements constituted a portion of the trip of carloads of freight which had been definitely committed to an interstate journey. Judge Maris in that case clearly stated the rule of law which is also applicable to the present case (151 F. 2d at 401-402):

> "We think that the facts thus disclosed establish that the defendant railroad is engaged in interstate commerce within the meaning of the acts upon which the plaintiff relies. The fact that the defendant railroad does not itself transport consignments of freight across state lines does not place it beyond the reach of the federal power under the commerce clause of the Constitution. Const. art. 1, § 8, cl. 3. If it takes part with other carriers in the continuous movement of a consignment of freight which passes across a state line at some point in its journey between the place of origin and the place of destination it becomes a participant in interstate commerce and, therefore, subject to the power of Congress under the commerce clause of the Constitution. The evidence, as we have seen, discloses that the defendant does exactly that.
>
> "Although the defendant's operation is largely confined to the movement of cars into and out of the Steel Company's works it nonetheless does move for a portion of their trip carloads of freight which have been definitely committed to an interstate journey. Compare Philadelphia & R. R. Co. v. Hancock, 1920, 253 U. S. 284, 40 S. Ct. 512, 64 L. Ed. 907. It is in this respect that the case is distinguishable from McCluskey v. Marysville N. R. Co., 1917, 243 U. S. 36, 37 S. Ct.

374, 61 L. Ed. 578, relied upon by the defendant. In view of the fact that the defendant does physically participate in a portion of the interstate movement of consignments of freight it becomes wholly unimportant that it does not itself publish tariffs or participate in the tariff charges of its connecting railroads."

The facts pertaining to the question of interstate commerce in the present case are strikingly similar to those in the *Kach* case. In both cases defendants received cars loaded with materials from the connecting interstate railroads, moved those cars to appropriate points in the plant works on the last leg of their interstate journey, and initiated shipments in interstate commerce by loading and moving cars to the connecting common carrier railroads. The only difference between the *Kach* case and the present one is that the manufacturer in *Kach* had duly organized a subsidiary railroad corporation, the Monessen Southwestern Railway Company, to operate a private intra-plant railroad *connecting* with common carriers, as it was required to do under the law of Pennsylvania (Constitution of Pennsylvania, Article 17, § 1; Act of 1851 April 15, P. L. [1852] 720 § 7); but the manufacturer in the present case (General Electric Company) in clear violation of the above-cited law of Pennsylvania failed to incorporate itself or a subsidiary as a railroad company for the purpose of engaging in activities which resulted, inter alia, in the accident now in question.

Shaw v. Monessen Southwestern Ry. Co., 200 F. 2d 841 (3d Cir. 1953) on which the Court below relied heavily in the present case, is clearly not in point with the present case: The *Shaw* case merely involves the question of whether plaintiff was an employee of the Pittsburgh Steel Company or its wholly owned subsidiary, the Monessen Southwestern Railway Company. If General Electric had organized a subsidiary intra-plant railroad corporation,

then perhaps we might have been presented with a problem analogous to the one in the *Shaw* case, namely, whether the plaintiff was an employee of General Electric or its subsidiary railroad corporation at the time of the accident. But in the present case General Electric, itself, and not through a subsidiary, has engaged in railroad activities identical to those performed by the Monessen Railway in the *Shaw* case and, of course, in the *Kach* case. The tests for employment of one person by another, listed in the *Shaw* opinion and repeated in the opinion in the present case, are completely irrelevant to the question now before this Court, which is: Whether the Pennsylvania Railroad, as a result of its authorization, permission and facilitation of General Electric's operating a connecting railroad without a franchise is to be considered General Electric's employer and therefore plaintiff's employer for purposes of the Federal Employers' Liability Act under the well-established principles of tort law discussed below.

B. Under the Applicable Common Law Rule General Electric Is Considered an Agent of the Pennsylvania Railroad and the Latter Is Subject to Liability as an "Employer" Within the Meaning of the F. E. L. A. to a Railroad Employee of General Electric Injured While Engaged in the Furtherance of Interstate Commerce as a Result of the Negligence of Fellow General Electric Railroad Employees.

1. We are not here advancing the contention that plaintiff was a "borrowed servant" of the Pennsylvania Railroad Company. We are assuming *arguendo* that he was in fact an employee of General Electric under the tests stated in *Shaw v. Monessen Southwestern Railway Company, supra.* Our contention is that under the well-established common law rule of tort law (Restatement, Torts, Sec. 428), *the Pennsylvania Railroad is subject to liability*

for bodily harm caused to plaintiff by the negligence of his fellow General Electric railroad employees just as though plaintiff had been in fact employed by the Pennsylvania Railroad.

Section 428 of the Restatement of Torts reads as follows:

> "§ 428. Contractor's Negligence in Doing Work Which Cannot be Lawfully Done Except Under a Franchise Granted to his Employer.
>
> "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity. . . ."

Section 428, in imputing the negligence of an independent contractor to the "employer" thereof, in juristic terms is designating the independent contractor as a constructive agent with regard to the performance of the non-delegable duties of the employer.

The general principle recited in Section 428 seems to be that "where public authority grants to an individual or corporation authority to engage in certain activities involving danger to the public, which right is denied to the general public, the duty to safeguard the public while performing such franchise activities, is legally non-delegable, and *the franchise holder is therefore responsible for the conduct of those whom it permits to act under its franchise, even though such persons be independent contractors.*" *Hodges v. Johnson*, 52 F. Supp. 488, 491 (W. D. Va. 1943). (Emphasis supplied) Accord: *Venuto v. Robinson*, 118 F. 2d 679 (C. A. 3, 1941); *Rosu v. Law*, 193 F. 2d 894 (C. A. 3, 1952); *Kissell v. Motor Age Transit Lines*, 357 Pa. 204, 53 A. 2d 593 (1947); see also Anno. "Independent Con-

tractor—Positive Duties", 28 A. L. R. 122-197; cf. *Atlantic Coast Line R. Co. v. Tredway,* 120 Va. 735, 93 S. E. 560 (1917), cert. denied 245 U. S. 670, 38 S. Ct. 191 (1918) where, in effect, an employee of defendant railroad's independent contractor performing a non-assignable duty of defendant was held to be defendant's "employee" within the meaning of the F. E. L. A.

We submit that the above-stated general rule of imputed negligence is directly applicable to the factual situation of the relationship between the Pennsylvania Railroad and General Electric in the present case for the following reasons: (1) General Electric had no franchise to operate its "private" railroad on which the accident in question occurred. (2) It would have been illegal for General Electric to connect its tracks with those of the Pennsylvania Railroad and to operate its private connecting railroad as an independent contractor without a franchise. (3) The Pennsylvania Railroad, a franchise holder, permitted and enabled General Electric to perform "franchise activities" without a franchise (i.e., move goods in interstate commerce by railroad), "which involves an unreasonable risk of harm to others". Therefore, the law treats General Electric as an agent of the Pennsylvania Railroad and subjects the Railroad to responsibility for General Electric's negligent conduct in its railroad operations.

The freight movements on the General Electric tracks constituted the initial or final phases of shipments in interstate commerce. It was the duty of the Pennsylvania Railroad, at General Electric's request, to make as many placements of cars in and around its plant as General Electric require[2] However, for the sake of its own convenience

2. Under the regulations of the Interstate Commerce Commission an industry is entitled to one free placement of cars per day (124a). This includes movements up to and from the loading platforms themselves, even though cars are taken out of the middle of a draft on the inbound tracks (122a). It was such a movement here involved. It was the Pennsylvania Railroad's work which was being done.

and economy, General Electric entered into an arrangement with the Railroad, described *supra*, whereby General Electric handled the initial and terminal phases of its own interstate freight movements *without a franchise*. Indeed on some occasions it moved cars in which less than carload lots were consigned to General Electric and the remaining portion of the freight was consigned to someone else (100a-101a). Only a common carrier could properly be performing that movement.

The Pennsylvania Railroad permitted and enabled General Electric to operate its "private" intra-plant railroad under and by virtue of the Railroad's own franchise. The duty of the Railroad to safeguard third persons "while performing such franchise activities is legally nondelegable, and the franchise holder [the Pennsylvania Railroad] is therefore responsible for the conduct of those whom it permits to act under its franchise [here, General Electric], even though such persons be independent contractors." *Hodges v. Johnson, supra.* Under the common law rule restated in Section 428 of the Restatement of Torts and applied by all the state and federal Courts, the Pennsylvania Railroad as franchise holder is liable to third persons, including, as we shall show *infra*, employees of General Electric, for the negligent acts of General Electric through its railroad employees in the unfranchised operation of its railroad.

In *Kissell v. Motor Age Transit Lines, supra*, at the time of its collision with defendant's truck, a tractor owned by Direct Transportation Company was being operated by plaintiff's decedent. The tractor was drawing a trailer owned by Lyons Transportation Company, Inc. Asserting that Direct was an independent contractor, Lyons contended that the trial judge erred in charging the jury that if it found that plaintiff's decedent, the driver of Direct's tractor, was negligent and his negligence was a contributing cause of the accident, Lyons was liable as a matter of law. The Supreme Court of Pennsylvania held (357 Pa. at 209):

"The shipment by Lyons was an interstate shipment by a public carrier for which Lyons had an Interstate Commerce Commission permit. Direct had no such franchise. Without this permit, the transportation could not legally have been furnished. Lyons could not transfer its responsibility and liability to one who did not have such certificate. To permit this to be done would render ineffective the requirements of the Federal Motor Carrier Act and regulations based thereon. The relationship of independent contractor whereby Direct was to carry the shipment in question and assume responsibility and liability could not validly be created: Kimble v. Wilson, supra, 281-282; Pennsylvania R. R. Co. v. Cameron, 280 Pa. 458, 466, 124 A. 638. The charge of the trial judge, that if Reed was negligent and that negligence was a contributing cause, then, as a matter of law, Lyons was also negligent, was proper."

2. We shall presume to state the question which we believe will immediately arise in the minds of the Honorable Justices of this Court: Since this action was brought under a federal statute, the F. E. L. A., would it be proper to apply the general common law rule of tort law and vicarious liability discussed *supra*, which is observed in the State Courts of Pennsylvania, which is also the forum, the locus of the accident and the place where the contract between Pennsylvania Railroad and General Electric was made, in order to bring the parties within the coverage of the Federal Act? Fortunately, this Court has already decided this point in the affirmative in the analogous case of *North Carolina Railroad Company v. Zachary*, 232 U. S. 248, 34 S. Ct. 305 (1914), cited with approval in *Southern Railroad Co. v. Lloyd*, 239 U. S. 496, 500, 36 S. Ct. 210, 211 (1916), and distinguished in *Hull v. Philadelphia & R. Ry. Co.*, 252 U. S. 475, 480, 40 S. Ct. 358, 360 (1920).

This Court in its opinion in *Chesapeake and O. Ry. Co. v. Stapleton*, 279 U. S. 587, 591, 49 S. Ct. 442, 443 (1929) summarized the holding in *Zachary* as follows:

> "In *North Carolina Railroad v. Zachary*, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, the action was brought in a state court of North Carolina to recover damages for the negligent killing of a locomotive fireman of the Southern Railway Company, lessee of the defendant. Under the law of the state, the North Carolina Railroad, as lessor of the Southern Railway Company, was held responsible for all acts of negligence occurring in the conduct of business upon the lessor's road, and its liability was extended to employees of the lessee, injured through the negligence of the latter. The state Supreme Court held that the Federal Employers' Liability Act did not apply. This Court, reversing that Court, held that the Federal Employers' Liability Act did apply to the case, and that the case should be submitted to the jury on the issue whether the fireman was engaged in interstate commerce at the time of death."

In *North Carolina Railroad Company v. Zachary*, the Court stated (232 U. S. 248, 258, 34 S. Ct. 305, 308):

> "The Court based its decision that the Federal act did not apply, in part upon the ground that the North Carolina Railroad is not an interstate railroad,—its tracks and property lying wholly within the state,—and that the corporation itself is not, although its lessee is, engaged in interstate commerce; the lessor's activities being confined to receiving annual rents and distributing them among its stockholders. The responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business on the lessor's road, as established by the same court in *Logan v. North Carolina R. Co.*, 116 N. C. 941, 21 S. E. 959, was recognized—indeed, reasserted. But, it was said that

is because a railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either." [156 N. C. 500, 72 S. E. 858.]

"It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is, that although a railroad lease as between the parties may have the force and effect of ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, *including employees as patrons*—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a 'common carrier by railroad, engaging in commerce between the states', and that the deceased was 'employed by such carrier in such commerce', within the meaning of the Federal act; provided, of course, he was employed by the lessee in such commerce at the time he was killed." (Emphasis supplied.)

The *Zachary* case establishes the rule that the law of the State where the accident occurs determines whether a defendant common carrier railroad in interstate commerce is subject to the responsibility of an employer to an injured railroad worker under the Federal Employers' Liability Act or, otherwise stated, whether the injured railroad worker is "employed by such carrier in such commerce"

within the meaning of the Act. *Certainly if the F. E. L. A. by virtue of a State statute includes the liability of a lessor interstate common carrier railroad to an employee of its lessee intrastate railroad injured as a result of the negligence of the latter, the F. E. L. A. likewise includes within its coverage the liability of an interstate common carrier railroad (the Pennsylvania Railroad) to a railroad employee of an unfranchised private interstate railroad company (General Electric) injured as a result of the negligence of the latter, by virtue of a universally followed common law rule of vicarious liability made applicable by the provisions of a State Constitution and statute.*

We submit that the present question is one of equal national importance with the question raised in the *Zachary* case: If within the purview of the Federal Employers' Liability Act a lessor cannot evade responsibility to a lessee's railroad employee created by State law, *a fortiori* a franchise holder should not be permitted to escape responsibility to the employee of an independent contractor it has permitted and enabled to operate a private connecting railroad in interstate commerce without a franchise.

We submit, therefore, that the decision of the Court of Appeals for the Third Circuit that the Pennsylvania Railroad was not subject to liability as an employer to plaintiff under the F. E. L. A. pursuant to the State constitutional provision and statute and common law (Restatement) rule cited *supra*, is in direct conflict with the decision of this Court in *North Carolina Railroad Company v. Zachary*, *supra*, and, therefore, that the Court of Appeals decision is erroneous as a matter of law. *The opinion of the Court below never met the real issue of law in the case.*

We further submit that the Court of Appeals has "decided an important state . . . question in a way in conflict with applicable state . . . law" (Rule 19(a), Revised Rules of the Supreme Court of the United States), for the foregoing reasons and for the additional reasons set forth *infra*.

II. The Decision of the Court of Appeals in Effect Exempts an Unfranchised Connecting Railroad From State Regulation as Well as From Responsibility Under the Federal Employers' Liability Act.

The Court of Appeals, we submit, had available but two alternative modes of deciding the appeal below: either (1) by construing General Electric's railroad activities as the lawful conduct by an agent of a duly franchised carrier within Section 428 of the Restatement of Torts or (2) by construing General Electric's railroad operations as the unlawful conduct of an independent contractor, Section 428 to the contrary notwithstanding. The Court of Appeals chose neither alternative; it instead held by implication that the Act of 1851 is ineffective (Appendix, pp. 4a-5a, *infra*), despite its plain, unequivocal language. Respondent has attempted to oppose our position with the extremely weak argument that "It is difficult to understand just what the statute [of 1851] cited does mean. . . ." (Appellant's Reply Brief, p. 5.) It admits the statute has never been repealed.

The Commonwealth of Pennsylvania clearly has the right to regulate those phases of interstate railroad operation occurring wholly within its borders as to which Congress has not exercised its constitutional supremacy. *Turner v. State of Maryland*, 107 U. S. 38, 2 S. Ct. 44 (1883).

The State has attempted to compel all private railroads connecting with common carriers in interstate commerce to obtain franchises to operate as common carrier railroads in order that such private railroads may be subject to regulation by the State.

The Pennsylvania Railroad, knowing that General Electric was not a franchised carrier, obtained the passage of city ordinances to cross 68th Street with its tracks and otherwise cooperated with General Electric in connecting their tracks and in enabling General Electric to carry on franchise activities in the operation of its railroad in in-

terstate commerce. The Railroad protected itself against possible liability resulting from negligent acts done by General Electric in the operation of its "private" railroad by indemnification provisions contained in paragraph Eighth of the May 14, 1925 agreement.[3] The Pennsylvania Railroad in paragraph Third (p. 6, *supra*), of the same agreement required General Electric to abide by all rules, regulations and orders, both state or federal, which the several regulating bodies might impose on it in connection with this General Electric operation, on threat of disconnection of the track and reimbursement of expenditures made by the Railroad if General Electric failed to comply. *All these prove that the Pennsylvania Railroad knew ab initio, from the day it agreed to this connection by General Electric with its tracks, that it was liable for all General Electric's operations as though it, the Pennsylvania Railroad itself, was performing them.* The Pennsylvania Railroad permitted General Electric to weigh its own outgoing freight (136a) for the Railroad's billing purposes. Ascertaining the weight of the freight carried by a common carrier is a non-delegable duty of the carrier. See I. C. C. Report No. 30556, dated January 3, 1955.

General Electric in the operation of its West Philadelphia railroad was doing Pennsylvania Railroad work, albeit for General Electric's own convenience and economy, without the burden of being subject to State and Federal regulation. The Pennsylvania Railroad by virtue of its arrangement with General Electric will have had the benefit of the performance of its non-delegable franchise duties

3. "Eighth: * * * The Industry also agrees to indemnify, and hold harmless the Railroad Company for loss, damage, or injury from any act or omission of the Industry, its employees, or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said side-track; and if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally." (184a-185a).

by General Electric railroad employees without the correlative responsibility under the F. E. L. A. to those employees injured as a result of the negligent performance by General Electric of such common carrier duties, unless the judgment of the court below is reversed.

We submit that the applicable rule of law is clear and that there is no law to the contrary. The District Court was correct in submitting the issue of the Pennsylvania Railroad's liability to the jury. As a fact issue, only the jury has the power to pass on it.

CONCLUSION.

The judgment of the Court of Appeals for the Third Circuit in the case at bar is predicated on a serious error of law. The decision below is in direct conflict with the decision of this Court in the *Zachary* case, *supra*. We earnestly submit that State policies in regard to the imposition of responsibility for negligent injuries to railroad employees upon corporations other than their actual employers should be upheld and enforced by the courts in their application of the Federal Employers' Liability Act, as was done by this Court in *Zachary*.

This petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

B. Nathaniel Richter,
Theodore H. Lunine,
Richter, Lord & Levy,
Counsel for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,074

WILLIAM F. KELLY

v.

PENNSYLVANIA RAILROAD COMPANY,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 8, 1957

Before GOODRICH and HASTIE, *Circuit Judges*, and McILVAINE, *District Judge*.

OPINION OF THE COURT.

(Filed May 16, 1957)

By GOODRICH, *Circuit Judge*.

This is an appeal by defendant from a judgment for plaintiff and from a district court refusal to enter summary judgment in its favor in an action brought under the Federal Employers' Liability Act, 45 U. S. C. A. §§ 51 *et seq.*

Plaintiff was injured while working on the premises of the General Electric Company in West Philadelphia. He was hit by a locomotive which was moving some freight cars from one part of General Electric's yard to another. Plaintiff first sued General Electric upon the theory that it was a carrier subject to the Act. Defendant won this suit because it was found that General Electric was not a common carrier. *Kelly v. General Electric Co.*, 110 F. Supp. 4 (E. D. Pa.), aff'd per curiam, 204 F. 2d 692 (3d Cir.), cert. denied, 346 U. S. 886 (1953).

Then plaintiff sued the Pennsylvania Railroad on the theory that he was an employee of the Pennsylvania Railroad and, therefore, came under the Federal Employers' Liability Act, citing e.g. *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (6th Cir. 1949). The trial court allowed the question to go to the jury asking that body whether it thought that plaintiff came within the spirit of the statute. This patently erroneous charge would be sufficient to call for a new trial. But because we think that on the undisputed facts plaintiff is not entitled to recover under the federal statute we shall not order a new trial but will instead direct the entry of judgment for defendant.

We have had in recent years two cases in this Court dealing with workmen who worked in the yard of a manufacturing plant and who were injured in the course of intrayard movement of freight cars. In each case we held that plaintiff was not the employee of a carrier subject to the Federal Employers' Liability Act. *Docheney v. Pennsylvania R.R.*, 60 F. 2d 808 (3d Cir.), cert. denied, 287 U. S. 665 (1932); *Shaw v. Monessen Southwestern Ry.*, 200 F. 2d 841 (3d Cir. 1953). In the *Shaw* case it was pointed out that the question involved was a mixed one of fact and law. The test for employment of one person by another is a legal test but what a particular employee was doing at the time of injury is a factual question. In the case before us there are no sharp disagreements upon the facts;

the disagreement is in the application of the facts. We shall take the facts most favorable to plaintiff in considering whether, by any possibility, the Pennsylvania Railroad is chargeable with the consequence of the accident to him.

1. In *Shaw* we pointed out that the place plaintiff worked and the equipment he used were exclusively the premises and property of Pittsburgh Steel Company and that the work he was doing at the time he was injured was that of the Steel Company.

That set of facts is repeated in the case before us. Kelly worked on General Electric premises. The work he was doing at the time he was injured was fixing a switch which belonged to General Electric and he was hit by a General Electric locomotive operated by a General Electric crew. The train operation in which plaintiff was hurt was wholly within General Electric's property and for the benefit of General Electric.

2. In *Shaw* it was pointed out that plaintiff was paid by the industrial employer and not the railroad for his work on the day he was injured. The same is true here.

3. In *Shaw* plaintiff sometimes worked for and was paid by the railroad, was assigned to his work in the industry yard by a railroad employee, was covered by a collective bargaining contract signed by the industry and the railroad, and had tenure and seniority benefits as a railroad employee. Kelly was hired by General Electric and had no such connections with defendant railroad.

4. In *Shaw* it was pointed out that the work plaintiff was doing was in charge of the industrial employer, not the railroad.

We thought that very important in the *Shaw* case and think it is here also. Kelly was directed by foremen of

General Electric. He was instructed in his duties as a laborer by a General Electric fellow employee. It is true that once he salted a frozen switch at the request (or direction) of a railroad employee and on two, maybe more, occasions he was directed to pick up debris by a railroad employee. However, the principal part of his job with General Electric was to pick up debris and in performing this assignment he was doing the work of General Electric not the railroad.

As one reads the record in this case and goes back again over the two cases last cited it seems clear to us that this case has less pointing to railroad employment than did either of the others.

Plaintiff suggests that the operation of the General Electric private yard could only be done by a common carrier and, therefore, General Electric must have been functioning as an agent of defendant. From this he concludes that plaintiff was an employee of defendant for purposes of the Federal Employers' Liability Act. Compare *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (6th Cir. 1949), with *DelVecchio v. Pennsylvania R.R.*, 233 F. 2d 2 (3d Cir.), cert. denied, 352 U. S. 909 (1956). The arguments suggested give credit to the ingenuity of counsel but we do not find them helpful in clarifying the case. We are told that in 1923 and 1924 the railroad got permission from the City of Philadelphia to lay tracks across 68th Street, then a dedicated but unopened public highway, "to and into" the General Electric plant. This same argument, in a somewhat different way, came up when plaintiff sued General Electric, 110 F. Supp. at 7, 8. We do not see its signficance. If it ever had any it was lost because by ordinance in 1926 this portion of 68th Street was stricken from the City plan.

Then plaintiff says that by a statute of 1851 connection between defendant railroad and General Electric's private plant railroad was forbidden and, therefore, the plant railroad must have been part of defendant's common carrier

system.[1] If plaintiff's interpretation of this statute means that it was illegal for the railroad to operate facilities connecting with General Electric's private facilities, the argument proves too much. Both Pennsylvania statutes[2] and the federal Interstate Commerce Act[3] recognize the existence of lateral railroads and private sidetracks and require common carriers to connect with them.

The movement of freight cars within an industrial plant is not carrier car service but the operation of a plant facility. *United States v. Wabash R.R.*, 321 U. S. 403 (1944); *New York Central & H.R.R. v. General Electric Co.*, 219 N. Y. 227, 114 N. E. 115 (1916), cert. denied, 243 U. S. 636 (1917). The former suit by plaintiff against General Electric established that the intraplant movement of these cars was not common carriage. We have no doubt of the soundness of that conclusion.

If there were points of substantial dispute on the facts, this case would have to go back for retrial and proper instructions. We believe we have been careful not to interfere with the fact-finding function of the jury on any dis-

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1. The statute relied on is found in PA. STAT. ANN. tit. 67, § 363 (Purdon 1930) which provides:

"Connection of private with public railroads prohibited

"It shall not be lawful for any private individual, or association of individuals, or any company or companies, to construct a private railroad connecting with any railroad authorized to be constructed by the laws of this state, with the Ohio and New York state lines, or with any railroad constructed or to be constructed in the states of Ohio and New York; and it shall not be lawful for any railroad company authorized by the laws of this state to connect with any such private railroad; and any violation of the provisions of this act shall subject all individuals or association of individuals violating the same, to the jurisdiction of the courts of this state, and to such forfeiture as the legislature may hereafter direct. (1851, April 15, P. L. [1852] 720, § 7.)"

2. PA. STAT. ANN. tit. 66, § 1176 (Purdon 1941); *Id.* tit. 67, §§ 472, 781 *et seq.* (Purdon 1930).

3. 49 U. S. C. A. § 1(9).

puted question here. We believe that on facts most favorable to plaintiff it is clearly established that he was not an employee of the Pennsylvania Railroad, was not doing its work at the time he was injured and he has no claim against the railroad under the Federal Employers' Liability Act.

The judgment will be reversed and the case remanded to the district court with instructions to enter judgment for defendant.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded to the District Court with instructions to enter judgment for the defendant.

Attest:

IDA O. CRESKOFF,
Clerk.

May 16, 1957.

ORDER SUR PETITION FOR REHEARING.

Present: GOODRICH and HASTIE, *Circuit Judges,* and McILVAINE, *District Judge.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT,

GOODRICH,
Circuit Judge.

Dated: July 8, 1957.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 529

WILLIAM KELLY,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PHILIP PRICE,
F. HASTINGS GRIFFIN, JR.,
BARNES, DECHERT, PRICE, MYERS & RHOADS,
Attorneys for Respondent.

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No. 529

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THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Should this Court undertake to interpret a state statute which is of no national significance and which the courts of the state have refused to give the interpretation now urged by petitioner?

2. Should a Pennsylvania statute passed in 1851 be interpreted to forbid a common carrier from performing a service required by the Interstate Commerce Act passed in 1906 and by Pennsylvania statutes passed in 1913 and 1937?

STATEMENT OF THE CASE

On March 1, 1949 the petitioner, a laborer hired and paid by the General Electric Company (General Electric) as a maintenance worker along the tracks of its industrial siding (44a, 53a, 54a, 20a, 43a, 90a, 115a-116a), was struck by a shifting engine built, owned and maintained by General Electric (6a-7a, 93a, 94a, 96a, 142a). The engine was operated by a General Electric engineman (6a, 24a, 135a), was manned by a General Electric crew (15a, 89a, 69a, 133a), and was in the process of making a shifting movement on tracks owned, operated and maintained by General Electric (13a, 16a, 33a, 40a-41a, 132a-134a, 135a, Defendant's Exhibit 3, 181a-189a). The movement was being made under directions of a General Electric yardmaster (130a, 136a) in the course of one of the numerous shifts of railroad cars made daily by General Electric within its own yard and buildings (93a, 133a). The accident occurred on General Electric property at a General Electric switch, which plaintiff was repairing at the express direction of a General Electric employee (48a-49a, 69a, 85a-87a, 133a).

Petitioner's medical expenses and other compensation were paid by General Electric under the Pennsylvania Workmen's Compensation Act (70a, 71a). Attempting to recover other benefits if he could, he brought two actions under the Federal Employers' Liability Act.[1] In the first he claimed that the General Electric's plant railway made that company a common carrier and that General Electric, his admitted employer, was hence liable to him under the FELA. He lost that suit when it was held that General Electric's plant facility did *not* make it a common carrier. *Kelly v. General Electric Co.*, 110 F. Supp. 4 (E. D. Pa.), *aff'd per curiam*, 204 F. 2d 692 (3rd Cir.), *cert. denied*, 346 U. S. 886 (1953). He then pursued the present case

1. 35 Stat. 65 (1908), as amended, 53 Stat. 1404 (1939), 45 U. S. C. A. § 51 *et seq.* (1952).

which he brought against The Pennsylvania Railroad Company (Railroad) in an attempt to establish a master-servant relationship with it. In the Court of Appeals he claimed for the first time that such a relationship arose because connecting General Electric's tracks to the Railroad's was forbidden by Pennsylvania law and that General Electric was therefore the Railroad's agent.

The Railroad had nothing to do with General Electric other than to furnish it routine interchange service, just as it would any industry with switch connections to its tracks. Starting about 1925, when trackage was laid in West Philadelphia to connect the General Electric plant tracks with the Railroad's main line tracks (Defendant's Exhibit 3, 181a-189a), and continuing up until the day of the accident, the Railroad had daily delivered inbound cars, both loaded and empty, to the General Electric interchange tracks, the point at which it was agreed that deliveries of cars both to General Electric and to the Railroad should be made, and had removed outbound cars from the interchange, a procedure taking roughly ten minutes (28a, 30a-31a; 65a-68a; 77a, 93a-94a, 138a-139a, 140a). Under the regulations of the Interstate Commerce Commission an industry is entitled to one placement of cars per day (124a), and there is a tariff charge for every intra-plant shifting move which an industry thereafter requests a railroad to make (120a). Since the cost to General Electric would have been prohibitive if the Railroad made the twenty to twenty-five shifting moves required daily by General Electric in and around its plant, and since there would not have been adequate flexibility for the industry's needs if it relied on the Railroad for such moves (99a, 123a, 133a), General Electric operated its own plant railway, which, at the time of the accident, contained approximately two and one-quarter miles of trackage (89a). Its two diesel engines, which operated entirely within the confines of the plant railway and the interchange tracks, removed inbound cars from the interchange, delivered outbound cars to the

interchange, and made the numerous movements of cars around the General Electric yard that the industry required for its own purposes (37a, 41a, 88a-89a, 131a).

Like other large industries [2] General Electric conducted its plant railway under the auspices of the Pennsylvania Department of Labor and Industry and in accordance with State regulations (89a-90a, 108a, 115a-116a). It was operated exclusively under the direction and control of its own supervisors, just as the Railroad crews who serviced the plant for ten minutes each day did so under the sole supervision of the Railroad conductor (29a-32a, 40a, 68a, 88a, 93a-94a, 97a, 103a-104a, 108a-109a, 130a-131a, 134a-135a, 136a-138a, 140a-141a).

The Railroad's motion for summary judgment was denied by Judge Ganey of the Eastern District of Pennsylvania who said, ". . . it is difficult to see how the plaintiff can sustain the position that he was employed by the defendant. Nevertheless . . . no matter how dim his position on that issue may now appear, he must be given the chance to prove his allegations before a fact finding body." (Appellant's Appendix, 3rd Cir., 5a).

At the trial petitioner failed to establish any facts to suggest that he was a "borrowed servant" or other agent of the Railroad, and in his petition for certiorari he admits there is "no material dispute concerning the facts" (Petition pp. 3-4). The jury decided in his favor after receiving from Judge Welsh, since retired, what the Court of Appeals called a "patently erroneous charge" (245 F. 2d 409, Petition p. 2a) that they should decide whether Congress meant the FELA to cover men employed by industries on plant railways as well as those employed by common carriers (152a-153a, 156a-159a).

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2. The General Electric plant railway, with its independently-owned diesel engines, is similar to that of about eight other industries in the Philadelphia area (120a). However, there are in the Philadelphia area alone between 1,000 and 1,100 industries with railroad sidings upon which industry personnel, by one means or another, move railroad cars (123a).

The Court of Appeals decided that under the "test for employment of one person by another" the undisputed facts showed that petitioner was *not* an employee of the Railroad, and accordingly ordered the entry of judgment for the defendant (245 F. 2d 408, Petition pp. 1a-6a).

Petitioner does not question that the Court of Appeals correctly applied to the facts of this case the generally accepted test concerning employment (Petition p. 17). His sole reason for asking this Court to consider the case is his claim that the Court of Appeals was wrong in holding that the employment question before them was not affected by an obscure Pennsylvania statute, which had nothing whatever to do with employment, which has been on the books for over one hundred years but which has never been applied or interpreted by the Pennsylvania appellate courts, and which would conflict both with the Pennsylvania Public Utility Law [3] and with the Interstate Commerce Act [4] if given the meaning petitioner would have this Court give it.

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3. Act of May 28, 1937, P. L. 1053, art. IV, § 406, 66 P. S. § 1176.

4. Act of June 29, 1906, c. 3591, 34 Stat. 585, as amended, 49 U. S. C. A. § 1(9).

ARGUMENT

I. The Petition Raises No Question Which Warrants Review by This Court.

This case presents no reason which justifies the grant of a writ of certiorari. SUPREME COURT RULE 19(b). Petitioner recognizes the principle that men employed by industries on plant railways are not within the coverage of the Federal Employers' Liability Act. *Docheney v. Pennsylvania R. R.*, 60 F. 2d 808 (3rd Cir.), *cert. denied*, 287 U. S. 665 (1932); *Shaw v. Monessen Southwestern Ry.*, 200 F. 2d 841 (3rd Cir. 1953); *DelVecchio v. Pennsylvania R. R.*, 233 F. 2d 2 (3rd Cir.), *cert. denied*, 352 U. S. 909 (1956). See also article by petitioner's counsel recommending legislation to change this situation, Richter and Forer, "Proposed Changes in the Laws Governing Injuries in Interstate Transportation", 67 *Harv. L. Rev.* 1003, 1009 (1953). However, in order to create a special exception for industrial employes in Pennsylvania, petitioner asks this court (1) to put an interpretation on the Pennsylvania State Constitution and an ancient Pennsylvania statute that has never been suggested by a Pennsylvania court, (2) to conclude from that interpretation that employes of industries maintaining plant railways in Pennsylvania are employes of the connecting common carriers serving the industries which employ them, and finally (3) to apply this newly found doctrine of Pennsylvania law so that petitioner may recover under a federal statute.

Petitioner's legal position is clearly fallacious, and the points he makes are little more than a confusing rehash of those he made some years ago in his unsuccessful attempt to have the federal courts hold directly that General Electric was a common carrier and hence subject to the FELA. *Kelly v. General Electric Co.*, 110 F. Supp. 4 (E. D. Pa.), *aff'd per curiam*, 204 F. 2d 692 (3rd Cir), *cert. denied*, 346

U. S. 886 (1953).[5] It is neither necessary nor fitting that this Court be burdened with the tedious undertaking of unraveling the confusion of the petition. SUPREME COURT RULE 23(4). The arguments it contains have been considered by an able Court of Appeals which did not "find them helpful in clarifying the case" (245 F. 2d 410, Petition p. 4a). They raise no federal question at all, and the State question suggested, whether an 1851 Pennsylvania statute [6] forbade an industrial railway to connect its tracks with those of a common carrier, is purely academic. Whatever significance the statute may have had a century ago, today the Pennsylvania Public Utility Law [7] and the Interstate Commerce Act [8] fully cover the rights and obligations of industries and common carriers with respect to switch connections. For these reasons alone the petition for certiorari should be denied. SUPREME COURT RULE 19(b).

5. For instance, throughout his petition he constantly refers to General Electric as operating a "railroad" "in interstate commerce" and time and again he suggests that the shifting of cars by General Electric crews with General Electric equipment is something "only a common carrier could properly be performing . . ." (Petition p. 20; see also pp. 4, 5-6, 7, 11, 14, 18, 19, 24, 25 and 26.) That in turn leads him to label the General Electric plant railway an "unfranchised railroad" performing the Railroad's "non-delegable franchise duties". (Petition pp. 14 and 11; see also pp. 4, 7, 9, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27.) However the earlier case established that the General Electric railway is a plant facility and *not* a common carrier and that it performs its own work solely for its own convenience, *not* the Railroad's (110 F. Supp. 8; and see the Opinion of the Court of Appeals in the present case, 245 F. 2d 410, Petition p. 5a).

6. Act of April 15, 1851, P. L. [1852] 720, § 7, 67 P. S. § 303. Petitioner says that this act "made explicit" a provision implied by the Pennsylvania Constitution "that any railroad company *not* incorporated as a common carrier railroad shall *not* have the right to connect with common carrier railroads." (Petition p. 12—Emphasis petitioner's.) The State Constitution neither says nor implies what petitioner claims it does. Most certainly its meaning was not "made explicit" by an act of the Legislature passed in 1851. The Constitution was enacted in 1874.

7. Cited in footnote 3, *supra*.

8. Cited in footnote 4, *supra*.

II. The Premise for Petitioner's Position Is Unsound.

It is unnecessary to consider each of the untenable points petitioner has made, for the fundamental premise upon which he rests his theory is unsound. Skipping over the fact that General Electric is not a railroad company and is under no obligation whatever to secure a franchise to operate its intra-plant facilities, any more than it would be if it shifted the cars within its plants by hand, by cable and winch, by truck, by bulldozer or by gravity, he says that the Pennsylvania Act of April 15, 1851, P. L. [1852] 720, § 7, 67 P. S. § 363, makes unlawful the switch connection between the Railroad's tracks and General Electric's because General Electric had no "common carrier railroad franchise from the Commonwealth." (Petition pp. 9, 12, 13, 16, 20, 25). As we told the Court of Appeals it is difficult to understand what the statute means. The reasons for its enactment are obscure (it was tacked onto the act "To Incorporate the Susquehanna and Erie Railroad Company"). Since its enactment in 1851 we know of no proceeding against any person or company for violating it, we know of no forfeiture directed by the Legislature under its provisions,[9] and we know of no judicial interpretation which adopts petitioner's views concerning its meaning. The statute has apparently been considered by a Pennsylvania appellate court on only one occasion. In *Corey v. Edgewood Boro.*, 18 Pa. Super. 216 (1901), A wanted to get rid of a railroad B had built on B's land. An attempt to have the railroad declared a nuisance was unsuccessful. It was then argued that the switch connection with the Pennsylvania Railroad was illegal under the 1851 statute and that the court should therefore approve eliminating the operation. The court was unwilling to interpret the statute as forbidding the switch connection, saying at p. 226, "We do not say that the owners of this way had no

9. Violation of the act was punishable by "such forfeiture as the legislature may hereafter direct."

right to connect their railroad with the Pennsylvania Railroad." The court also held that even if the statute were construed to make the connection illegal, that would apply only to the switch connection and not to the operation of the railroad as such. Therefore A was in no position to raise the question. We believe that this is the only appellate case in which the question of interpreting this obscure statute has been raised, but no court, state or federal, has suggested that this statute retained any operative significance after the passage of the Interstate Commerce Act in 1906 and the Pennsylvania Public Service Company Law in 1913.[10] In short, whatever its original purpose, the statute has long since become ineffective and is of no significance whatever in Pennsylvania today.

There is no point in attempting to interpret this old, ambiguous statute, for one thing is certain. The statute does not mean what the petitioner says it does. Contrary to his assertions, it is not unlawful for a railroad company to supply a switch connection for an industrial siding or railway like General Electric's. The present Pennsylvania Public Utility Law[11] *requires* railroads to make such connections. The Interstate Commerce Act[12] likewise *requires* such connections.

Recognizing that the Court of Appeals was correct in deciding that an interpretation of the 1851 statute which conflicted with the Pennsylvania Public Utility Law and the Interstate Commerce Act could not be sustained (245 F. 2d 410, Petition pp. 4a-5a), petitioner adopts a remarkable approach to avoid that Court's decision. Without the citation of a single case and without so much as a reference to the wording of the statutes, he says that the Pennsylvania Public Utility Law and the Interstate Commerce Act

10. Act of July 26, 1913, P. L. 1374, art. II, § 1(o), the forerunner of the present Public Utility Law cited in footnote 3, *supra*.

11. Cited in footnote 3, *supra*.

12. Cited in footnote 4, *supra*.

"merely require common carrier railroads to construct, maintain and operate switch connections with commercial sidings, that is, shippers' side tracks", and seems to conclude that the Act of 1851 prohibits such a connection if the industry uses engines of its own to move cars on its own trackage instead of moving them by hand, by tractor, by truck, by cable and winch or by bulldozer. (Petition pp. 13, 14). Such a distinction is being suggested here for the first time and there is nothing in the wording of the statutes to support it. Petitioner would agree that the Interstate Commerce Act and the Pennsylvania Utility Law require connections to be made with "sidetracks" and "lateral railroad tracks" but only if the industry itself moves no engines on them. (Petition pp. 13, 14). However, the Interstate Commerce Act covers switch connections between common carriers and any "lateral, branch line of railroad or private side track . . ." 49 U. S. C. A. § 1(9), and The Pennsylvania Public Utility Law requires such connections with "any lateral railroad or any private sidetrack," 66 P. S. § 1176, as did the 1913 forerunner of that statute, the Pennsylvania Public Service Company Law.[13] The statutes all refer to "railroads" and none even remotely suggests the limitation the petitioner professes to find from the Act of 1851.

However the Act of 1851 cannot limit in any way the broad scope of the Pennsylvania Public Utility Law or the Interstate Commerce Act and it therefore cannot have the effect petitioner ascribes to it. No responsible person in Pennsylvania has ever suggested that the Act of 1851 had any bearing on the connection of railroads with plant facilities such as General Electric's. On the contrary the operation of such facilities is recognized as lawful, and the record in this case shows that the General Electric plant railway is operated in accordance with the regulations issued by the Pennsylvania Department of Labor and Industry for indus-

13. Cited in footnote 10, *supra*.

trial railways (89a-90a, 108a, 115a-116a). Thus the State regulates such railways but does so without reference to the Act of 1851.[14]

Not only does the Department of Labor and Industry recognize the propriety of the operation of plant railways such as General Electric's, but also no one has ever sought to prevent it or to restrain the connection of such railways with operating railroads. On the only reported occasion on which such a connection was questioned, *Corey v. Edgewood Boro.*, 18 Pa. Super. 216 (1901), *supra*, the court refused to accept the construction now suggested by petitioner, saying (p. 226), "We have not deemed it necessary to put a construction on the section of the Act of 1851 called to our attention." But in addition the court stated clearly (p. 225), that even if the "connecting" were forbidden, that would not have the effect of making the operation of the railroad itself unlawful.

Petitioner's whole argument is based upon the premise that the operation by General Electric of its plant facility became "forbidden railroad business" because the Act of 1851 made unlawful the connection between General Electric's tracks and the Railroad's tracks. That connection was made in about 1925 (181a) at a time when both the Interstate Commerce Act and the Pennsylvania Public Service Law required it. Thus petitioner's fundamental premise is unsound and in conflict not only with existing statutory law, both State and federal, but also with the only Pennsylvania case on the subject. It is not necessary, therefore, to consider the untenable conclusion he draws from

14. Since petitioner did not mention the 1851 statute until he reached the Court of Appeals, over five years after the suit was brought, the record at trial does not contain evidence as to the number of plant railways throughout Pennsylvania similar to General Electric's. However the Court may take judicial notice of the fact that they are very numerous and have developed to complement the growth of the country's heavy industry. There are eight plant railways comparable to General Electric's in the Philadelphia area alone (120a).

his premise, namely that an unlawful switch connection turned General Electric into the Railroad's agent. See *Cleveland, Cincinnati, Chicago & St. Louis Ry. v. U. S.*, 275 U. S. 404, 413-4 (1928), in which arguments somewhat similar to petitioner's were held to have no substance.

CONCLUSION

Nothing distinguishes the General Electric plant railway from the thousands of other plant facilities throughout the country. Petitioner's reason for suggesting that coverage of the Federal Employers' Liability Act should be extended to employes of private industrial railways in Pennsylvania is based upon such a thoroughly unjustified interpretation of a State statute that it does not warrant consideration by this Court. The disposition by the Court of Appeals of the question petitioner raises was so clearly correct that nothing further is required.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

PHILIP PRICE,
F. HASTINGS GRIFFIN, JR.,
BARNES, DECHERT, PRICE, MYERS & RHOADS,
Attorneys for Respondent.

October, 1957.